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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75- 75-5444

EHRLICH ANTHONY COKER,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR WRIT OF CERTIORARI
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on May 20, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at _____ Ga. _____, 216 S.E.2d 782 (1975) and is set out in Appendix A hereto, pp. 1a-16a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on May 20, 1975. A timely motion for rehearing was denied on June 17, 1975; a motion for leave to file a second motion for rehearing was denied on July 10, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws, 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States, and to the Due Process of Law and Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Whether the procedures followed to ascertain petitioner's competence to stand trial on a capital charge were adequate to protect petitioner's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when the psychiatrist appointed to examine petitioner was unable to make a diagnosis as to petitioner's competence, and recommended further and more extensive testing, and when the State introduced no expert testimony concerning petitioner's competence?

4. Whether petitioner's rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States were violated by his exclusion from an evidentiary hearing at which testimony was taken and evidence introduced concerning the question whether veniremen with conscientious scruples against the death penalty had been excluded for cause earlier in his trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the CODE OF GEORGIA
Code of Georgia:

Ga. Code Ann. § 26-2001 (1972)

> "Rape.--A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one or more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

Ga. Code Ann. §26-1312 (1972)

> "Kidnapping.--(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
>
> . . . .
>
> A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-1813 (1972)

> "Motor vehicle theft.--(a) First offense.--(1) Motor vehicles.--The theft of any motor vehicle as defined by an Act regulating traffic upon the highways, approved January 11, 1954 (Ga. Laws 1953, Nov.-Dec. Sess., p. 566) [Chapters 68-15 through 68-17], shall be a felony. Any person convicted thereof shall, the first offense, be punished by imprisonment in the penitentiary for not less than three years nor more than seven years: Provided that the jury may recommend that same be punished as for a misdemeanor."

Ga. Code Ann. §26-1902 (1972)

> "Armed robbery.--A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-2501 (1972)

> "Escape.--A person commits escape when he: (a) having been convicted of a felony or misdemeanor, or of the

violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement; or (b) being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement. A person who, having been convicted of a felony or misdemeanor, is convicted of escape shall be punished by imprisonment for not less than one nor more than five years. Any other person convicted of escape shall be punished as for a misdemeanor except that a person who commits escape while armed with a dangerous weapon shall, upon conviction, be punished by imprisonment for not less than one nor more than 10 years."

Ga. Code Ann. §26-3102 (1974 supp.)

"Capital offenses; jury verdict and sentence.--Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1974 supp.)

"Recommendation to mercy.--In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Said recommendation shall be binding upon the judge."

Ga. Code Ann. §27-2503 (1974 supp.)

"Presentence hearings in felony cases.--(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.
(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

Ga. Code Ann. §27-2514 (1974 supp.)

"Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.--Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1 (1974 supp.)

"Mitigating and aggravating circumstances; death penalty.--(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record

of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary of arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation.

The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537 (1974 supp.)

"Review of death sentences.--(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws 1973, No. 74, p. 162

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict

or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty of pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury of judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on May 20, 1975, affirming petitioner's death sentence. Petitioner, Ehrlich Anthony Coker, a white man, was sentenced to death on November 22, 1974, for the rape of Mrs. Elnita Carver, a white woman. 1/

On September 2, 1974, petitioner was serving sentences for murder, rape, kidnapping, and aggravated assault at the Ware Correctional Institution near Waycross, Georgia. 2/ At 8:10 p.m., during an Alcoholics Anonymous meeting in the prison chapel attended by petitioner and thirty-two other inmates and supervised by two guards, an inmate named Brink suddenly brandished a two foot long wrench and declared, "Don't move. This is an escape. I don't

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1/ At his trial for rape, petitioner was also convicted of armed robbery, kidnapping, motor vehicle theft, and escape, and sentenced to, respectively, terms of life imprisonment, twenty years imprisonment, seven years imprisonment, and five years imprisonment, to be served consecutively. The Supreme Court of Georgia affirmed these convictions and sentences. Coker v. State, __Ga. __, 216 S.E.2d 782 (1975); App. A, infra.

2/ On March 12, 1973, petitioner was convicted in the Richmond County Superior Court of the kidnapping and rape of one Susan Lorrine Jones and received sentences of, respectively, life imprisonment and twenty years imprisonment. On May 28, 1973, in the Taliaferro County Superior Court, petitioner pleaded guilty to the rape of and aggravated assault upon Miss Jones, and received sentences of, respectively, life imprisonment and eight years imprisonment. On April 6, 1973, in the Clayton County Superior Court, petitioner pleaded guilty to the rape and murder of one Sue Ann Wick and received sentences of, respectively, twenty years imprisonment and life imprisonment.

want to hurt anybody." T. 5.[3] The guards were allowed to gather together the inmates who were not assisting Brink, and a group of nine prisoners, including petitioner, refused to join the guards. T. 7. Petitioner and three others began tearing out the plywood ceiling in a hallway leading to the chapel and climbed into an attic which opened onto the roof of the building; the chapel was part of the main prison building and was partially surrounded by a cyclone fence which delimited the prison grounds. A few minutes later, guards took charge of the other inmates in the chapel without any violence and returned them to their respective cells. A head count revealed that petitioner and two other prisoners were not present in their cells. T. 34.

Later that evening, at approximately 11:00 p.m., Mr. Allen Carver and his wife, Elnita, who had given birth to a son three weeks earlier, were in the kitchen of their Waycross home when petitioner suddenly entered the room through the unlocked kitchen door. Petitioner, who was five feet, seven inches tall and who weighed 140 pounds, T. 183, was wearing prison clothes and was holding a "board", T. 48, over his head. He said,"'Don't anybody try anything and nobody will get hurt,'" T. 97, and ordered the Carvers to go into the bedroom where he had Mrs. Carver tie her husband's hands and feet together with one of her blouses. Not satisfied with this job, petitioner then tied Carver to the shower rod in the bathroom. Petitioner changed into a pair of Carver's pants and inquired whether the couple had any cigarettes, a gun, anything to drink. Mrs. Carver gave him some iced tea, and, while in the kitchen, petitioner turned out the lights and put a steak knife with a four inch long blade under his belt. T. 53-54. He also took Carver's billfold, which contained $20.30, and the keys to the family car from a dresser top. He then pushed the baby, who was asleep in his basinette throughout the incident, into the bathroom with Carver, who complained that his hands were growing numb in their bonds. T. 92. Petitioner replied that "it was better than being dead," ibid., but he untied Carver from the shower rod and bound his hands to the bathroom sink and his feet to the toilet and put a pillow under his head, T. 93. According to Carver, petitioner "said for me not to try anything funny, that he didn't want to have to hurt me, and he said he'd hurt me . . . . [i]f I tried anything." T. 52.[4]

3/ The record in this case is composed of a two volume, 251 page trial transcript (hereinafter cited as "T."), a separately paginated one volume, 48 page commitment hearing transcript (hereinafter cited as "C.H.T."), a separately paginated, one volume, 98 page transcript of the hearing on petitioner's special plea of insanity (hereinafter cited as "I.T."),a separately paginated one volume, 73 page sentencing hearing transcript (hereinafter cited as "S.T."), a separately paginated, one volume, 25 page transcript of the hearing on petitioner's motion to correct transcript (hereinafter cited as "C.T.T."), and a separately paginated, one volume, 65 page appellate record in the Georgia Supreme Court (hereinafter cited as "R.").

4/ On cross-examination, Mr. Carver testified:

> "Q [Defense Counsel] Now, I thought I understood you to say that after he had you tied with your hands on the sink and your feet around the commode, is that when he said, 'Don't try anything funny. I don't want to hurt you'?"
> A [Mr. Allen Carver] No.
> Q When did he say that?
> A When he started to messing with my wife and I told him that he said he wasn't going to do it, and he just said, 'Shut your mouth.' He said, 'I don't want to have to hurt you.'
> Q He didn't say he was going to hurt you, did he? He said he didn't want to hurt you? Is that right?
> A Yes."
>
> T. 100

Petitioner then ordered Elnita Carver, who was wearing a night gown, to get dressed so she could show him how to start the family car. She asked whether she could go to the bathroom to change clothes, "and he said no, that he'd saw plenty of naked people before and he told me to go ahead and change the clothes right there." T. 139. Then, according to Mrs. Carver:

> "[w]hen I pulled off my gown he come up there and he started feeling of me -- he come up to the back of me and started feeling of me, and I started crying and I told him to quit, and he kept on saying that he wouldn't hurt me, and that I'd better shut up, and I kept on telling him to quit and not mess with me. I told him not to touch me, or anything, and he gagged Allen so that he couldn't talk. I think it was with a piece of underwear and then tied something around his mouth, and he closed the bath room door so that Allen couldn't see him, and then he kept on feeling of me and I kept crying and telling him to quit, and Allen started trying to say something, and I couldn't understand what he was saying. He was mumbling something. And I kept on telling him to quit and he said, 'I ain't hurting you, am I.' And I was scared and I didn't know what to say, and I just shook my head no, and I didn't say nothing and he said,'I want your husband to know that I ain't hurting you.' He said, 'Tell your husband I ain't hurting you.' And I just said, 'Uh, huh,' like that. I didn't say it loud, and he said, 'He can't hear you saying it like that,' and, so, I said, 'No.' And then he said -- he said, 'Come on out and tell your husband that I ain't hurting you if I ain't,' and, so I said, 'Allen, he ain't hurting me,'"

T. 139-140. Petitioner then disrobed, "held the knife up at" Mrs. Carver, T. 140, placed it on top of the dresser, and proceeded to have sexual intercourse with her.[5] Petitioner did not "hurt . . . [her] in any other way physically aside from" the act of intercourse. T. 159.

After putting his clothes back on and allowing Mrs. Carver to dress, petitioner inquired whether she knew the way to Atlanta. Neither she nor her husband could give petitioner directions, and petitioner announced that he was taking Mrs. Carver with him. According to Mrs. Carver, petitioner declared to her husband:

> "'I'm going to take your wife with me, and if I don't get stopped by a police car or anything before I get to Waresboro,' he said, 'I'll tie her up and put her out at the station in Waresboro at that corner,' .... [H]e pulled the gag off of Allen's mouth when he was talking to him, and Allen said, 'Well, just make sure you don't hurt her,' and he put the gag back on his mouth and he said -- he said, 'Well, I'm taking her with me.' He said, 'If you get loose and call the police,' he said, 'any time I see a police car pull up behind me and motion for me to get over or something like that,' he said, 'your wife is going to be dead.'"

T. 143.[6]

After petitioner drove away with Mrs. Carver sitting beside him, Allen Carver managed to untie himself and call the police. A widespread search for petitioner and Mrs. Carver was undertaken. A few miles outside of Waresboro, an unmarked police car passed the Carver automobile at a high rate of speed,[7] and petitioner

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5/ A vaginal examination of Mrs. Carver, performed at 5:00 a.m., September 3, 1974, disclosed the presence of sperm, but the doctors were unable to determine the particular male who was the source of the sperm. T. 171.

6/ According to Mr. Carver, petitioner gestured at Mrs. Carver with the knife during this speech. T. 58. According to Mrs. Carver, however, the knife was in petitioner's back pocket at this time. T. 144.

7/ The Sheriff of Ware County, who was driving this unmarked patrol car, later testified that he had suddenly come up behind the Carver car at a curve in the road and had elected to pass the car without attempting to stop it or signal to it in order to prevent harm to Mrs. Carver. T. 184-185.

suspected that it was a police car and that a roadblock had been set up ahead. T. 146. He turned off onto a dirt road, but the road soon came to a dead end, and he backed the car around and stopped, informing Mrs. Carver that they would wait there until the road block was lifted. T. 147. Petitioner unbuttoned her blouse but closed it again when she complained of the mosquitoes. Ibid. He also described his plan to get another car for his trip to Atlanta. T. 148. About ten minutes later, however, a police car turned down the dirt road and stopped in front of the Carver car. According to Mrs. Carver:

> "[h]e said, 'I think that's a policeman right now,' and I didn't say nothing. He said -- he said, 'Well, I reckon they're going to get me now,' and, he said, 'I won't never get away.' And I kept on setting there, and right after that one come up and parked some more cars started coming up and they all parked and all I could see was the lights shining, and then all those men got out and they started coming up there and they told him to get out of the car, and he set there for a minute and then he got up and got out of the car and they took him to the back and searched him and handcuffed him."

Ibid. Petitioner did not attempt to harm Mrs. Carver with the knife, which was behind the car's sun visor, although, according to the Sheriff, he had "ample opportunity", T. 190, to do so.

Petitioner entered a special plea of not guilty by reason of insanity, R. 11, to the charges of rape, kidnapping, armed robbery, motor vehicle theft, and escape, which were filed against him as a result of the events of September 2-3, 1974, and he also

pleaded that he was "now insane and unable to conduct his own defense." R. 27. The issue of petitioner's competence to stand trial was tried separately to a jury before trial of the general issue of petitioner's guilt or innocence, pursuant to Ga. Code Ann. §27-1502 (1972).[8] At this hearing, petitioner testified that he had received a blow to the head with a baseball bat when he was ten or eleven years old and that, as a result, he had blackout spells and memory lapses and frequently heard mysterious voices. I. T. 14-16. He also testified that it was his habit to drink alcohol heavily and frequently and that he customarily passed out as a result of a drinking bout. I.T. 16. Petitioner's defense counsel testified that petitioner was unable to assist effectively in his defense since he was unable to relate key facts, frequently altered his story of what happened, and seemed utterly unconcerned about the possible capital consequences of some of the charges he faced. I. T. 30, 32-33. Dr. Clarence

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8/ Under Georgia practice, a special plea of insanity under Ga. Code Ann. §27-1502 (1972) raises only the question whether a defendant is sane at the time of trial. If a defendant claims he was insane at the time the offense was committed, the defense must be determined when the jury renders its general verdict. See Cochran v. State, 212 Ga. 245, 91 S.E.2d 601, 603 (1956).

M. Johnson, a psychiatrist appointed pursuant to petitioner's motion,[9] interviewed petitioner for fifty minutes and examined his past psychiatric record, but he concluded that further psychological testing and an electroencephalograph monitoring would be necessary to reach a definite diagnosis, I.T. 45. In Dr. Johnson's opinion, petitioner exhibited symptoms of a temporal lobe seizure disorder due to the childhood blow on the head which, when aggravated by alcohol, might account for petitioner's aggressive behavior and which might prevent him from fully cooperating with defense counsel. I.T. 48-49. In his report, Dr. Johnson concluded that "'it appears we are dealing with an underlying psychiatric disorder,'" I.T. 50; he emphasized, however, that in the absence of further examination and analysis, he could not even express an opinion as to whether petitioner "knows right from wrong", I.T. 57, and could cooperate in his defense. The State presented the testimony of the sheriff, two deputy sheriffs, and the warden and a medical technician at the Ware Correctional Institution, all of whom had observed petitioner in custody, I.T. 65-88; these witnesses stated that petitioner appeared to them to be mentally competent and capable of understanding the proceedings against him. The trial court instructed the jury that it was

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9/ The trial court had directed this examination "for the purpose of determining whether the said defendant was criminally responsible, i.e., whether he knew right from wrong, on the 2nd day of September, 1974, and for the further purpose of determining whether the said defendant is mentally fit to stand trial for the above charges at the November, 1974 term of Ware Superior Court." R. 21.

petitioner's burden to satisfy them by a preponderance of the evidence that he was presently incapable of understanding the nature and object of the proceedings against him.[10] I.T. 91-92. The jury returned a verdict stating, "We the Jury find the defendant, Ehrlich Anthony Coker, competent." R. 28.

At petitioner's trial, which began on the day after the hearing on the special plea, Dr. Johnson was the only defense witness, and he again testified that his interview and evaluation of petitioner was "inconclusive" and that "further testing was indicated." T. 215. He stated that he simply could not determine whether petitioner "was able to judge between right and wrong", and could not rule out the possibility of brain damage, T. 227, T. 220, on the basis of his examination. He added that the temporal lobe seizure

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10/ The trial court defined in the following fashion the question to be considered by the jury:

> "Now, members of the jury, I charge you that the question raised by the defendant's special plea of insanity in this trial is not whether the defendant can distinguish between right and wrong, but whether or not he is capable at this time and at the time of his trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings and is capable of rendering his attorney such assistance as a proper defense to this indictment preferred against him demands."

I.T. 93.

disorder that he suspected petitioner was subject to could be "physically demonstrated or precluded" by electroencephalogram or intoxointerview techniques. T. 222.

The trial judge instructed the jury that a defendant was presumed sane but that upon the introduction of "some competent evidence of insanity", T. 239, the State was obligated to prove sanity beyond a reasonable doubt.[11/] The jury was obligated to find petitioner not guilty by reason of insanity if it found either that he was unable to distinguish between right and wrong or that he was subject to a "delusional compulsion" at the time of the crime.[12/]

11/ "I further charge you that this presumption of sanity may be relied on by the State, and in most cases the State need not bear the burden of introducing evidence and of persuasion as to the sanity of the accused in criminal proceedings; but once the affirmative defense of insanity is raised by the defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State, in order to prove the criminal intent of the accused, must present evidence to prove the sanity of the accused beyond a reasonable doubt." T. 239.

12/ "Now, ladies and gentlemen of the jury, I charge you that the test of criminal responsibility in this State is that if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. And there has been but one recognized exception -- delusional compulsion. Our law provides a person shall not be found guilty of a crime when at the time of the act, omission or negligence constituting the crime, such person, because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

Now, in this State no cognizance is taken of what has been termed impulsive or emotional insanity, where a criminal act is done under some overwhelming and irresistible impulse, unless it be that such impulse is the result of a mental disease or mental defect overriding reason and judgment and obliterating the sense of right and wrong so as to fall within the generally accepted right and wrong test, or the exception above referred

[Cont'd]

The jury found petitioner guilty as charged of rape, kidnapping, armed robbery, motor vehicle theft, and escape. T. 248.

A hearing was convened the next day pursuant to Ga. Code Ann. §27-2503(b)(1974 supp.) to determine sentence on the rape and armed robbery charges. The State introduced evidence of petitioner's prior convictions, see note 1, supra. Petitioner introduced no evidence. The trial court instructed the jury

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12/ [Cont'd]

to of delusional compulsion. Nor under our law is any recognition taken of so-called moral insanity, or of an irresponsibility from a lack of ability to control the will from the habit of indulgence; nor does mental abnormality, mere weakmindness, unless amounting to imbecility or idiocy, which, like lunacy or insanity, may be held to deprive the offender of the sense of right and wrong. Now, the defendant being impressed with delusions of hallucinations is not enough. His criminal act must stem from such mental disease, injury or congenital deficiency, or else his accountability for the criminal act is measured by the general test of whether he could at the time of the crime's commission distinguish right from wrong." T. 241-241a.

that it "may consider," S.T. 42, as a statutory aggravating circumstance justifying imposition of the death penalty for armed robbery, whether the offense was committed by a person with a prior record of conviction for a capital felony.[13] The jury was instructed that it could consider as statutory aggravating circumstances justifying imposition of the death penalty for rape, (1) whether the offense was committed by a person with a prior record of conviction for a capital felony, and (2) whether the offense was committed while the offender was committing another capital felony (armed robbery).[14] The trial court emphasized, however, that "of course, you are under no circumstances required to impose the death sentence, regardless of any aggravating circumstances," S.T. 44, since the jury was free to find that "mitigating circumstances"

13/ "Now, as to Count 1, wherein the defendant has been found guilty of Armed Robbery, you may consider the following aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed: 1. The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony." S.T. 42-43.

14/ "Now, as to Count 2, wherein the defendant has been found guilty of Rape, you may consider one or more of the following statutory aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed under Count 2: 1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment." S.T. 43.

predominated:

> "mitigating circumstances are those that do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability of punishment [sic]."

S.T. 45.

The jury's punishment verdict on the armed robbery count was "Recommend Mercy For The Defendant." R. 51.[15] The jury's verdict on the rape count was "Death by Electrocution", and it found both of the aggravating circumstances which the trial court had instructed upon. R. 52.[16]

On April 11, 1975, pursuant to the State's Motion to Correct Transcript, a hearing was held in the Coffee County Superior Court to determine whether any veniremen had been excluded on account of religious or conscientious scruples

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15/ The punishment verdict form given to the jury for this count contained three alternatives: "1. Death by Electrocution 2. Recommend Mercy For The Defendant 3. Recommend That The Judge Impose Sentence." R. 51. The jury had drawn a line through the first and last alternatives.

16/ The jury received a punishment verdict form similar to the one described in note 15, supra, and it drew a line through the second and third alternatives. R. 52. The form also stated "If death is recommended and fixed as punishment, complete the following: We further find the following aggravating circumstances:", ibid., and the jury had written in the ensuing blank space: "1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to-wit: The Armed Robbery of Allen Carver as charged in Count I of the indictment." Ibid.

On December 4, 1974, petitioner was sentenced by the trial court to life imprisonment on the armed robbery count, twenty years imprisonment on the kidnapping count, seven years imprisonment on the motor vehicle theft count, and five years imprisonment on the escape count, the sentences to be served consecutively.

against the death penalty (voir dire had not been recorded by the clerk). The trial court overruled defense counsel's objection that petitioner was absent, C.T.T. 5-6, and proceeded to hear a witness and argument. The trial court then made a written finding that "no prospective Juror was excused on the basis of being conscientiously opposed to Capital Punishment."

On May 20, 1975, the Supreme Court of Georgia affirmed petitioner's convictions and sentences, Mr. Justice Gunter dissenting.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. On November 11, 1974, petitioner filed a Motion to Quash the indictment because the statutory provision of the death penalty for rape "is unconstitutional in that it constitutes cruel and unusual punishment per se and as applied to defendant herein, in violation of the Eight [sic] and Fourteenth Amendments to the Constitution of the United States." R. 18. This Motion was denied, R. 53, and petitioner assigned this ruling as error, Enumeration of Error No. 2. A majority of the Georgia Supreme Court rejected this claim:

> "In motion, appellant made a general attack on the constitutionality of the Georgia Death Penalty Statute, Ga. L. 1973, pp. 159, 163 (Code Ann. § 27-2534.1). This statute has been repeatedly upheld by a majority of this court. See Coley v. State, 231 Ga. 829, 933, 204 S.E.2d 612; Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12; Hooks v. State, 233 Ga. 149, 210 S.E.2d 668; Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (decided April 9, 1975). We affirm those rulings here."

Coker v. State, __Ga.__, 216 S.E.2d 782, 788 (1975); App. A, infra, at 7a.

II. Petitioner's Motion to Quash also alleged "the crime of rape and providing for punishment by death is unconstitutionally vague, indefinite, discretionary, and overbroad so as to violate the due process and equal protection clauses of the State of Georgia and United States Constitution." R. 18. This Motion was denied, R. 53, and petitioner assigned this ruling as error, Enumeration of Error No. 2. A majority of the Georgia Supreme Court rejected this claim:

> "Additionally, appellant attacks the . . . , the rape statute, Code Ann. § 26-2001 . . . as being unconstitutionally vague, indefinite, discretionary and overbroad so as to violate due process and equal protection clauses of the Georgia and United States Constitutions.
>
> Neither at trial nor before this court has appellant supported these contentions with persuasive argument or authority."

Coker v. State, ___Ga.__, 216 S.E.2d 782, 788 (1975); App. A, infra, at 7a.

III. Petitioner's Enumeration of Error No. 16 asserted "[t]he judgment of the Court finding the appellant competent to stand trial was decidedly against the weight and strength of the evidence and was contrary to the evidence and law of the case," and his Enumeration of Error No. 47 declared, "[t]he verdict of the jury as to each count failing to acquit the appellant by reason of insanity is erroneous and contrary to the weight of the evidence." In his Opening Brief, petitioner contended, inter alia, that "[i]n view of . . . [the] testimony by Doctor Johnson, the only expert witness called at the trial

of the Special Plea of Insanity, it is clear that further testing should have been ordered by the Court in order to fully determine the competency of the appellant to stand trial." Opening Brief of Appellant, Coker v. State, Ga. Sup. Ct. No. 29758 (unpaginated). A majority of the Georgia Supreme Court rejected this claim:

> "This court will not set aside a verdict (or judgment) finding against a special plea of insanity at the time of trial unless it appears that the evidence demands a finding in favor of the plea."

Coker v. State, __Ga.__, 216 S.E.2d 782, 791 (1975); App. A, infra, at 10a.

IV. On April 9, 1975, the State filed a Motion to Correct Transcript in the Ware County Superior Court to determine "[w]hether or not any prospective jurors were excluded or excused [at petitioner's trial] on the basis of being conscientiously opposed to capital punishment." A hearing was held on April 11, 1975, in the absence of petitioner, and defense counsel objected that "[t]his is a fact finding process in the trial court, and I feel like the defendant has an absolute constitutional right to be present at all times when this is done." C.T.T.5. This objection was overruled, C.T.T.6, and petitioner assigned this ruling as error in a supplementary Enumeration of Errors: "The Court erred in overruling appellant's timely objection to the conduct of the post-conviction trial court proceeding held on April 11, 1975 for the reason that the appellant was not present at said proceeding and he had not waived his presence prior thereto." (No. 2). The Georgia Supreme Court rejected this claim:

> "Due to the nature of the proceeding the appellant's presence was not required at this administrative hearing with counsel."

Coker v. State, __Ga.__, 216 S.E.2d 782, 797 (1975); App. A, infra, at 16a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF GEORGIA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS, 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Georgia, Eberheart v. Georgia, No. 74-5174, filed August 19, 1974, at pp. 19-58 (attached as Appendix B, infra) and of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876, filed June 11, 1974, at pp. 19-22 (attached as Appendix C, infra).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCEDURES FOLLOWED TO ASCERTAIN PETITIONER'S COMPETENCE TO STAND TRIAL ON A CAPITAL CHARGE WERE ADEQUATE TO PROTECT PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE PSYCHIATRIST APPOINTED TO EXAMINE PETITIONER WAS UNABLE TO MAKE A DIAGNOSIS AS TO PETITIONER'S COMPETENCE, AND RECOMMENDED FURTHER AND MORE EXTENSIVE TESTING, AND WHEN THE STATE INTRODUCED NO EXPERT TESTIMONY CONCERNING PETITIONER'S COMPETENCE.

In Drope v. Missouri, ____ U.S. ____, 43 L.Ed.2d 103, 112-113 (1975), the Court recognized that "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." "[T]he conviction of an accused person while he is legally incompetent violates due process," Pate v. Robinson, 383 U.S. 375, 378 (1966). See also United States v. Knohl, 379 F. 2d 427, 434 (CA2 1967); Thomas v. Cunningham, 313 F. 2d 934, 938 (CA4 1963). Cf. Bishop v. United States, 350 U.S. 961 (1956). Moreover, "state procedures must be adequate to protect this right," Pate v. Robinson, supra, 383 U.S. at 378. The present case presents an important procedural question left unanswered by Pate and Drope: is a hearing "adequate" to determine competence when the State introduces no expert testimony and when the court-appointed psychiatrist who has interviewed the defendant is unable to give a medical opinion as to the defendant's competence because further examination is necessary?

Petitioner entered a special plea of insanity to the charges against him, pleading that he was "now insane and unable to conduct his own defense," R. 27. Petitioner moved for a psychiatric examination, and the trial court appointed Dr. Clarence M. Johnson "for the purpose of determining whether . . . [petitioner] was criminally responsible, i.e., whether he knew right from wrong, on the 2nd day of September, 1974, and for the further purpose of determining whether the . . . [petitioner] is mentally fit to stand trial . . . at the November, 1974 term of Ware Superior Court." R. 21.

A hearing was held on November 18, 1974, to adjudicate petitioner's special plea of insanity and determine his competence to stand trial. Petitioner testified that when he was ten or eleven years old he was knocked unconscious by a blow on his forehead with a baseball bat. I.T. 14-15. Since then, petitioner suffered frequent blackout spells and "heard voices talking to" him "pretty frequent." I.T. 16. In response to a question as to whether he understood "what's happening here in this court room today", he replied, "I'm not sure . . . . Trying to get me help, yes, sir." I.T. 17. Petitioner also stated that it had been his habit to drink large quantities of alcohol and that he frequently drank until he passed out. R. 16. Petitioner's counsel described his experience with petitioner:

> "I'm not trying to testify as a psychiatrist. I have one here that'll do that. It is my professional opinion, based on my experience with other defendants, that this man is definitely disturbed and in need of considerable help. It is also my opinion, based

> on my talking to him in my investigation of the case, that he is unable to give me substantial facts in the case."

I.T. 31.

Dr. Clarence M. Johnson described at length his "general psychiatric evaluation", I.T. 44, of petitioner. Dr. Johnson interviewed petitioner for fifty minutes and also reviewed his medical record kept by the Georgia correctional authorities in an effort to determine petitioner's present mental competence. Because of petitioner's history, his drinking habits, and the childhood blow on the head, Dr. Johnson "was concerned about the possibility of what we call temporal lobe seizure disorder, which is recorded in some cases of acute, aggressive, destructive behavior in individuals that suffer from this disorder, and, of course, this is why I recommended electroencephalogram as to exclude this as a possibility." I.T. 47-48. The doctor indicated that he could not diagnose brain damage caused by excessive alcohol intake or the blow on the head simply by talking to petitioner. I.T. 47. Dr. Johnson also "felt" that petitioner "had a disturbance in affect or feeling tones," I.T. 49, "to a pathological degree", I.T. 51, that might prevent him from cooperating with counsel and from fully comprehending the seriousness of the charges he was facing. His final conclusion was that "'[i]in view of his inappropriate affect or feeling tones along with explosive

and impu[l]sive behavior that is sometimes combative and his emotional detachment from stressful events that have happened in the past, it appears we are dealing with an underlying psychiatric disorder.'" I.T. 50. Because of the limited medical facilities at the place of the examination, Dr. Johnson was not able to take an electroencephalogram or administer psychological tests. "[A]t this time I don't think I could answer" the question whether petitioner was mentally competent, I.T. 56: "I was unable to determine a diagnosis." I.T. 65.

The State presented the testimony of the sheriff, two deputies, a prison warden, and a prison medical technician who had conversed with petitioner while he was incarcerated. All testified that he appeared to understand what was said to him and that he made appropriate responses.

The jury returned a verdict, <u>see</u> pp.18-19, <u>supra</u>, finding petitioner competent to stand trial, I.T. 95, whereupon petitioner was tried the next day upon his general plea of not guilty by reason of insanity, R. 25.

Dr. Johnson was the only defense witness, and he repeated the testimony he gave at the special plea hearing:

"Q [Defense counsel] Now, Doctor, will you tell the jury, please, what you found as a result of your psychiatric evaluation?

A [Dr. Johnson] The conclusion of the interview and the evaluation was inconclusive.

Q Inconclusive of what?

A That I did not reach or determine a definite diagnosis in this case. I felt there were indications that further testing was indicated.

Q Now, further testing because of what?

A Because of the observations that were made during the examination made it inconclusive.

Q Did you find positive, direct evidence of any mental or psychiatric disorder?

A There were several observations that were made that indicated that this could not be excluded.

Q That it could not be excluded?

A Yes. . . .

Q (BY MR. BENNETT [defense counsel]) Doctor, what were your recommendations for further examination?

MR. HAYES [for the State]: We object to that as being irrelevant.

THE COURT: Overruled.

Q (BY MR. BENNETT) What, specifically,did you recommend by way of further treatment or evaluation?

A It was felt that two diagnostic aids would be helpful. One was the electroencephalogram; the other would be psychological testing.

Q Now, Doctor, did you have access to an electroencephalogram here in Waycross?

A I did not.

Q Did you have access to what you said -- accurate psychological evaluation or testing here in Waycross?

A I did not feel like I did.

Q What you're saying is that it was beyond your power to do this within the time frame of what you had to do with this individual?

A That would be correct."

T. 215-216. Dr. Johnson testified that the symptoms he was able to observe indicated petitioner might be suffering from some form of schizophrenia or other psychosis:

"Q [Defense counsel] Now, Doctor, do you have any reason to suspect any of those conditions in this defendant?

MR. HAYES [for the State]: Your Honor, we object to what he had reason to suspect. It's getting to the point of complete imagination on his part.

THE COURT: Let's get his finding with some degree of certainty.

Q (BY MR. BENNETT [defense counsel]) Did your finding indicate or suggest any possibility of any of those conditions that you just described?

THE COURT: Are you saying that is a possibility?

MR. BENNETT: No, sir. Do your findings indicate the possibility of any of these.

THE COURT: That's what the objection was to, I understood. It's too indefinite -- possibility.

MR. BENNETT: Well, we try to be as definite as we can, but we're trying to show what we can by this witness.

THE COURT: That's what I want you to do -- show the facts.

MR. BENNETT: That's exactly what I am trying to do.

THE COURT: Let him state his findings, and let's go on.

MR. HAYES: We object on the ground that 'possibility' is so speculative as to amount to imagination.

MR. BENNETT: May we be heard on that?

THE COURT: Ask the doctor what his findings are and let's go on."

T. 218. As to the question of "whether or not he [petitioner] was

able to judge between right and wrong",Dr. Johnson made "an in[con]clusive finding. This was why I recommended further evaluation." T. 220. He again stated his view that petitioner might be afflicated with an organic temporal lobe seizure disorder, S. T. 221:

> "Q(BY MR. BENNETT[defense counsel]) Doctor, can the presence of this lobe disorder you're talking about be objectively or physically demonstrated or precluded?
>
> A [Dr. Johnson] Yes, there are certain tests that can be made.
>
> Q What are those tests?
>
> A Well, electroencephalogram can be very diagnostic. Also sometime [sic]in using the electroencephalogram plus what we call an intoxinterview, allowing the individual to become intoxicated and then recording his electrical impulses of the brain, sometimes will show even a more or higher percentage of pathology.
>
> Q Are these the tests that you would recommend for him or have recommended for him?
>
> THE COURT: Let's go on with that. That's not going to decide any issue before the court. Go on with another question.
>
> MR. BENNETT: May we have an answer to that one?
>
> THE COURT: No. What we want to know is what the doctor knows of this person's condition.
>
> Q(BY MR. BENNETT) All right, now, Doctor, can you tell us anything else about his condition?
>
> THE COURT: Not what the doctor might find out if he had additional time, or anything like that. I don't want to dwell on that any further. All we want to know is what the doctor has determined as a result of that examination.
>
> Q (BY MR. BENNETT) Now, Doctor, what, if anything, else can you tell us about the defendant's knowledge of right and wrong?
>
> A Well, I felt that at the conclusion of my examination

> in summing that there were underlying psychiatric conflicts to the extent of which I was unable to determine, and I don't feel that with the examination I did that I can answer that, either positive or negative.
>
> Q Do you have any kind of opinion at all that you can share with the jury?
>
> THE COURT: I understood him to just say he didn't have any opinion at this time.
>
> MR. BENNETT: Well, I'm just asking him if he has any kind of opinion.
>
> THE COURT: Well, I understood him to say he didn't, but I may have understood him wrong.
>
> THE WITNESS: I could not reach a definite opinion."

T. 222-223.

The State presented no evidence of petitioner's mental capacity at the time of the crime.

The trial court instructed the jury that it could find petitioner not guilty by reason of insanity, see pp.20-21, supra, but the jury found petitioner guilty on all five counts.

Georgia statutes clearly provide that a mentally incompetent defendant shall not be tried and that insanity at the time of the commission of a crime is a legal defense. "No lunatic or person afflicted with insanity shall be tried, or put upon trial, for any offense, during the time he is afflicted with such lunacy or insanity." Ga. Code Ann. §27-1504 (1972). "In all criminal trials in any of the courts of this State wherein an accused shall contend that he was insane or mentally incompetent under the law at the time of the act or acts charged against him were committed, the trial judge shall instruct the jury that, in case of acquittal on such contention,the jury shall specify in their

verdict that the accused person was acquitted because of mental irresponsibility or insanity at the time of the commission of the act."[17/] Ga. Code Ann. §27-1503 (1972). "Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury."[18/] Ga. Code Ann. §27-1502(1972). "The test of criminal responsibility in . . . [Georgia] is that 'if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible'; and there has been but one recognized exception, which is that although 'a man has reason sufficient to distinguish between right and wrong * * * yet [if] in consequence of some delusion the will is overmastered and there is no criminal intent,' he is not responsible, 'provided that the act itself is connected with the peculiar delusion under which the prisoner is labouring." Rozier v. State, 185 Ga. 317, 195 S.E. 172, 174 (1938). The test for mental competence,

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17/ When such a verdict is rendered, it is then the duty of the trial judge to "retain jurisdiction of the person and to order the person to be confined in a State hospital for the mentally ill." Ga. Code Ann. §27-1503 (1972).

18/ The normal procedure in Georgia on a special plea of incompetence to stand trial is to hold a pre-trial hearing on this question. See Ga. Code Ann. §27-1504 (1972); Hardwick v. State, 231 Ga. 181, 200 S.E. 2d 728, 730 (1973). Where a general plea of not guilty by reason of insanity is entered, this question is generally submitted to the jury at the close of trial as an alternative to the verdicts of "guilty" and "not guilty". Carr v. State, 96 Ga. 284, 22 S.E. 570, 571-572 (1895). The jury is instructed, however, that it must decide whether the defendant is not guilty by reason of insanity before it determines whether he is guilty or not guilty. See T. 232.

however, "is not whether the defendant can distinguish between right and wrong, but is, whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against his demands." Brown v. State, 215 Ga. 784, 113 S.E. 2d 618, 620 (1960). "Such a procedure is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent." Drope v. Missouri, supra. 43 L.Ed.2d at 114.

The procedures followed in this case were inadequate, however, to insure the petitioner was mentally competent, under Georgia law, on September 2, 1974 and at the time of his trial. For although petitioner was interviewed by a psychiatrist, the conditions under which the interview took place made the results inconclusive. Further testing was clearly necessary here since the psychiatrist indicated that he suspected brain damage which might make petitioner incapable of distinguishing between "right" and "wrong" and of cooperating with defense counsel. It is the responsibility of the State and of the trial court to insure that a criminal defendant has an adequate opportunity to present the issue of his competence to stand trial.[19/]

19/ The present vitality of this Court's holding in Leland v.

[Cont'd]

As this Court has recognized, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, supra. 383 U.S. at 384. Defense counsel here, however, clearly and consistently raised the issue of petitioner's competence.

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." Drope v. Missouri, supra, 43 L.Ed.2d at 118. The Court should grant review to determine whether a tentative medical judgment that a defendant is mentally incompetent, in the absence of any countervailing expert testimony by the State, obligates the State to make "further inquiry" into the defendant's mental condition before placing him on trial for his life.

19/ [cont'd]

Oregon, 343 U.S. 790, (1952) that a state requirement that a defendant prove his insanity beyond a reasonable doubt, is not relevant to this case, since petitioner's jury was instructed, T. 239 (and see note 11, supra), that a defendant's sanity was presumed but, upon introduction of "some competent evidence of insanity" by the defendant, the State must prove his sanity beyond a reasonable doubt.

IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED BY HIS EXCLUSION FROM AN EVIDENTIARY HEARING AT WHICH TESTIMONY WAS TAKEN AND EVIDENCE INTRODUCED CONCERNING THE QUESTION WHETHER VENIREMEN WITH CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY HAD BEEN EXCLUDED FOR CAUSE EARLIER IN HIS TRIAL.

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of the trial," Illinois v. Allen, 397 U.S. 337, 338 (1970). See also Lewis v. United States, 146 U.S. 370, 372-375 (1892). See generally Pointer v. Texas, 380 U.S. 400 (1965). This case presents a question meriting review by this Court concerning the applicability of the Confrontation Clause to post-trial hearings where critical factual findings are made.

The voir dire testimony of veniremen during the selection of petitioner's trial jury was not recorded or transcribed in its entirety. Petitioner's Assignment of Error Number 17 to the Georgia Supreme Court alleged that the trial court erred in allowing the State to "qualif[y] the jury as to the death sentence," and petitioner's opening brief in the Georgia Supreme Court indicated that certain jurors had been excused on account of conscientious scruples against the death penalty.[20/] On February

---

20/ "When the District Attorney qualified the jury as to the death sentence all jurors who stated that they could not, under any circumstances, consider imposition of the death penalty were excused. (Trial Tr. 1.) This exclusion from the jury of veniremen of conscientious scruples against the death penalty violated appellant's rights of the due process of equal protection clauses of the United States Constitution and the Georgia Constitution [sic]. In addition the exclusion of death scrupled veniremen on the panel

12, 1975, while petitioner's appeal was pending before the Georgia Supreme Court, that Court decided Owens v. State, __Ga.__, 214 S.E.2d 173, and held that the failure to transcribe the voir dire examination of capital case jurors excluded for cause on account of their conscientious scruples against the death penalty was reversible error.[21] On April 9, 1975, the State filed a

---

20/ cont'd.

from which appellant's jury was selected violated appellant's Sixth Amendment Right to a jury which reflects a fair and representative cross-section of the community." Opening Brief of Appellant, Coker v. State, Ga. Sup. Ct. No. 29758 (unpaginated).

21/ "In the present case, although portions of the voir dire examination of the veniremen appear in the transcript, the examination as it relates to Witherspoon did not appear in the transcript as it was originally transmitted to this court. The clerk of the trial court states that the reporter has nothing more on the questioning. The transcript does show that appellant objected to the method of selecting the jury . . . . In Ross v. State, 233 Ga. 361, 211 S.E.2d 356, this court forecast the result reached in this case by requiring the Witherspoon examination to be transcribed and transmitted. Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 . . . . Code Ann. § 6-805(d) provides that 'Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings . . . and all other proceedings which may be called in question on appeal . . . shall be reported . . . ' In light of Witherspoon, supra, Code Ann. § 27-2401 does not diminish this requirement. . . . In the instant case, the amended motion for new trial stated that the trial court excluded potential jurors who stated that they had conscientious objections to the death penalty, and that movant objected to said exclusion but that the court overruled the objection and allowed the jurors to be excluded. The recital of facts contained in the amendment was approved as true and correct. For the reasons given above, a motion made by the State for permission to supplement the trial transcript pursuant to Code Ann. § 6-805(f) has been denied. A posttrial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review function. We hold that failure to record the Witherspoon voir dire in a case in which the sentence of death is imposed, is reversible error. We therefore reverse the judgment in this case insofar as it imposed the death sentence and remand it to the trial court for a new trial on the question of the sentence." Owens v. State, supra, 214 S.E.2d at 175-176.

"Motion to Correct Transcript" in the Ware County Superior Court to determine "[w]hether or not any prospective jurors were excluded or excused [at petitioner's trial] on the basis of being conscientiously opposed to capital punishment."[22]

A hearing on this motion was held two days later in the Coffee County Courthouse, Douglas, Georgia. On this day, April 11, petitioner was incarcerated at the Georgia State Prison, Reidsville, Georgia. At the opening of this hearing, petitioner's counsel objected that the proceeding should not be conducted in petitioner's absence:

> "This is a fact finding process in the trial court, and I feel like the defendant has an absolute constitutional right to be present at all times when this is done. For example, I believe that he's gonna try to put the Clerk on the stand, ask him what his recollection of wat happened was, possibly try to introduce jury lists to show whether or not somebody was excused or not. I've already discussed the matter with the District Attorney. My recollection of what happened is different from his. I've not had time, though, to talk to my client and see what his recollection is. . . .

22/ The Motion sought a judicial determination of three questions:

> 1.
> "Whether or not at the trial of the above case in the Superior Court of Ware County, was Voir Dire of the Jury recorded.
>
> 2.
> Whether or not any prospective jurors were excluded or excused on the basis of being conscientiously opposed to capital punishment, and if so, what was the courts judicial determination relative thereto.
>
> 3.
> Whether or not there were any objections made by Counsel for the Defendant in relation to Voir Dire which were not included in the transcript of the trial."

> I am not in a position to waive the presence of the defendant here today at this motion. I'm just stating that I do not and I cannot waive his presence in Court . . . . Were we in Ware County, I could not waive his presence at this critical matter. And the Court is well aware that we are talking about a capital death case. And I believe that any proceedings undertaken by this court of a fact finding nature in the absence of the defendant would be absolutely erroneous."

C.T.T. 5-6. The State presented no evidence concerning the feasibility of securing petitioner's attendance. Petitioner's counsel's objection was overruled, however, and the State called as a witness the Clerk of the Ware County Superior Court who testified at length and was cross-examined as to what occurred during the voir dire at petitioner's trial. A venire list and three volumes of reporter's transcript were also placed in evidence by the State.On the basis of this testimony and documentary evidence, the trial court made factual findings which were transmitted to the Georgia Supreme Court.[23/]

23/ The trial court found:

> "In the motion to correct the Transcript, the District Attorney has submitted three questions for a Judicial Determination by the Court, and after hearing the evidence presented, argument of counsel and the recollection and knowledge of the Court as to what transpired during the trial of this case, the Court finds as follows. to-wit:
>
> 1.
> That the Court Reporter, W. J. Summerall, did not record the entire Voir Dire of the prospective Jurors, but that he did record all objections which were made during Voir Dire questioning.
>
> 2.
> The Court further finds that after an examination of the Clerk of Ware Superior and the original Jury list from which the Jury was selected, that no prospective Juror was excused on the basis of being conscientiously opposed to Capital Punishment. The Transcript of the trial does show that the District Attorney did ask the question as to whether anyone

The decision of the Georgia Supreme Court that this hearing was simply an "administrative hearing with counsel" at which petitioner was not entitled to be present, Coker v. State, ___Ga.___, 216 S.E.2d 782, 797 (1975); App. A, infra, at 16a, simply does not withstand scrutiny. For this hearing concerned not ministerial details pertaining to the appellate record but rather the making of new factual findings concerning what had transpired at voir dire. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, supra, 146 U.S. at 372. As the Lewis case itself recognizes (since it dealt with the presence of the defendant at jury selection), this right to be present is not confined to the period between the empaneling of the jury and the return of a verdict. Instead, the "trial" at which a defendant is entitled to be physically present includes any proceeding "after the case is called for trial which involves his substantial rights." Hopt v. Utah, 110 U.S. 574, 578 (1884). Cf. Rogers v. United States, 43 U.S.L.W. 4763, 4764-4765 (U.S., June 17, 1975); Shields v. United States, 273 U.S. 583, 588 (1927). This right is "scarcely less important to the accused than the right to trial itself," Diaz v. United States, 223 U.S.

23/ cont'd.

> on the panel had any opposition to Capital Punishment, but he did not receive an affirmative answer from a single Juror, and therefore the court did not excuse or disqualify a prospective Juror on the grounds they were opposed to Capital Punishment.
>
> 3.
> The Court further finds that there were no other objections by counsel for the Defendant or the State during the Voir Dire of the Jury which is not included in the record and Transcript of the Trial."

442, 454 (1912), since a defendant's:

> "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers . . . . The necessities of the defense may not be met by the presence of his counsel only."

Hopt v. Utah, supra, 110 U.S. at 578. Since no record existed of the voir dire, petitioner was entitled to be present when testimony and documentary evidence was introduced to establish, for the record, what had happened at that proceeding, just as he was entitled to be present at the voir dire itself. This motion hearing is significantly different from a hearing to prepare an official version of a trial transcript where there are verbatim reporter's notes of the entire trial, see, e.g., Chessman v. Teets, 354 U.S. 156 (1957).[24/]

Although a criminal defendant may waive his right to be present at judicial proceedings by his disruptive behavior in the courtroom, Illinois v. Allen, supra; Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), or by his consent, Diaz v. United States, 223 U.S. 442, 456-457 (1912), there is no question of waiver here, since petitioner's counsel strenuously objected that petitioner should be present at the hearing and since the State entered no evidence that it would be impossible (or even difficult) to produce petitioner. In view of the Georgia Supreme Court's

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24/ Even in Chessman, a pre-Pointer v. Texas case decided under the Due Process Clause, the Court held that a criminal defendant or his counsel must be present at such a hearing: "Petitioner is entitled to have his conviction reviewed upon a record which has been settled in accordance with procedural due process." Chessman v. Teets, supra, 354 U.S. at 164 n.12.

Owens decision, the trial court's findings were of critical importance for a finding that veniremen were excluded on the basis of their expressed scruples against the death penalty would result in the automatic granting of a new trial. Under these circumstances, petitioner had a constitutional right to confront the witness and evidence introduced by the State (which had not, of course, been presented at the original voir dire hearing) and to assist his counsel by providing his own recollection of what actually happened during jury selection. Although it is uncertain whether petitioner's physical presence would have made a difference in the trial judge's findings, such an inquiry is irrelevant to the issue whether petitioner's Sixth Amendment rights were violated here. The question presented here is one of continuing importance. Cf. Tacon v. Arizona, 410 U.S. 351 (1973)(certiorari dismissed as improvidently granted).

Conclusion

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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Supreme Court, U. S.
FILED
NOV 8 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-5444

EHRLICH ANTHONY COKER, PETITIONER

v.

STATE OF GEORGIA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI FILED, SEPTEMBER 15, 1975
CERTIORARI GRANTED, OCTOBER 4, 1976

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CHRONOLOGY

DATE 1974	
Oct. 18	The Ware County Superior Court Grand Jury, April Term, 1974, returned a five count indictment (No. 5097) against petitioner charging him with the following September 2, 1974 crimes: (1) the armed robbery of Allen Carver (count one); (2) the rape of Elnita Carver (count two); (3) the kidnapping of Elnita Carver (count three); (4) the motor vehicle theft of Allen Carver's automobile (count four); and (5) escape from the Ware County Correctional Institution (count five).
Nov. 11	Petitioner pleaded "not guilty" to all counts of the indictment.
Nov. 11	Petitioner filed a Motion to Quash the indictment on the ground, *inter alia,* that imposition and execution of the death penalty for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.
Nov. 11	Petitioner entered a Special Plea of Insanity to the five counts of the indictment: "not guilty by reason of insanity as provided under the Georgia Code Annotated, Section 27 1502."
Nov. 11	Petitioner made a Motion to Sever for trial counts four and five of the indictment.
Nov. 11	Petitioner entered a Demurrer to the indictment alleging, *inter alia,* prejudicial joinder.
Nov. 12	Petitioner filed a Petition for Examination requesting a "psychiatric examination prior to his trial"; the trial count appointed Dr. Mack Johnson to examine petitioner on November 3, 1974 "for the purpose of determining whether the said defendant was criminal responsible, i.e., whether he knew right from wrong, on the 2nd day of September, 1974, and for the further

purpose of determining whether the said defendant is mentally fit to stand trial for the above charges at the November, 1974 term of Ware Superior Court."

Nov. 15 Petitioner filed an amendment to Motion to Quash.

Nov. 15 Petitioner filed an amendment to his Special Plea of Insanity. Petitioner entered a Plea of Insanity: "insan[e] at the present time," and requested trial of this issue by a special jury.

Nov. 18 A jury was selected for the sanity hearing and for trial.

Nov. 18 The trial court entered an order denying petitioner's amended Motion to Quash, petitioner's Motion to Sever, and petitioner's Demurrer.

Nov. 19 Trial was held on the issue of petitioner's sanity; the jury returned a verdict of "competent". The trial court entered a final judgment finding petitioner "competent and sane."

Nov. 20 Trial of petitioner on the five count indictment began.

Nov. 21 The jury returned a verdict finding petitioner guilty as charged on all five counts of the indictment.

Nov. 22 A presentence hearing was held; the jury returned a punishment verdict on count one, armed robbery: "Recommend Mercy For The Defendant," and on count two, rape: "Death by Electrocution" (with two "aggravating circumstances" found on count two).

Dec. 4 The trial court sentenced petitioner to life imprisonment for armed robbery (count one); death for rape (count two); twenty years for kidnapping, consecutive to the sentence on count one (count three); seven years for motor vehicle theft, consecutive to the sentence on count three (count four); five years for escape, consecutive to the sentence on count four (count five).

Dec. 4 The trial court filed a "Report of the Trial Judge" required in cases where a death sentence is imposed.

Dec. 4 Petitioner filed a Notice of Appeal in the Supreme Court of Georgia.

1975

Apr. 9 The State filed a Motion to Correct Transcript in Ware County Superior Court on the ground that "the transcript . . . is silent relative to any prospective juror being excused [on account of conscientious scruples against the death penalty]".

Apr. 11 A hearing was held on the Motion to Correct Transcript; the trial judge found "that no prospective Juror was excused on the basis of being conscientiously opposed to Capital Punishment."

May 20 The Supreme Court of Georgia affirmed petitioner's convictions and sentences, with one Justice dissenting.

June 9 Petitioner filed a Motion for Rehearing.

June 17 The Supreme Court of Georgia denied the Motion for Rehearing with one Justice dissenting.

June 20 Petitioner filed a Second Motion for Rehearing.

Jul. 10 The Supreme Court of Georgia denied the Second Motion for Rehearing, with one Justice dissenting.

Sept. 15 Petitioner filed a Petition for Certiorari and a Motion to Proceed *In Forma Pauperis* in this Court.

Oct. 22 The State of Georgia filed Brief in Opposition in this Court.

1976

Oct. 4 This Court granted petitioner's Motion to Proceed *In Forma Pauperis* and the Petition for Certiorari, limited to Question One.

[Indictment: Ware County Superior Court, April Term, 1974]

COUNT NUMBER #1

In the name and behalf of the Citizens of Georgia, charge and accuse Ehrlich Anthony Coker, with offense of Armed Robbery. For that the said Ehrlich Anthony Coker on the 2nd day of Sept., in the year Nineteen Hundred and Seventy Four in the County aforesaid, did then and there unlawfully and with force and arms, with intent to commit theft, took from the person and the immediate presence of Allen Carver, the following property to-wit: one billfold containing $20.30 in U.S. currency, of the property of Allen Carver, of the value of $20.30, by the use of a 4 foot 1X4 board, and a knife, both being offensive weapons in the manner used,

Contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT NUMBER #2

THE GRAND JURORS, as selected, chosen and sworn for the County of WARE, in the name and behalf of the Citizens of Georgia, further charge and accuse Ehrlich Anthony Coker with the offense of Rape.

For that the said Ehrlich Anthony Coker on the 2nd day of Sept., in the year Nineteen Hundred and Seventy Four, in the county aforesaid, did then and there unlawfully and with force and arms, did have Carnal Knowledge of Elinta Carver, a female, forcibly and against her will,

Contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT NUMBER #3

THE GRAND JURORS, as selected, chosen and sworn for the County of WARE, in the name and behalf of the Citizens of Georgia, further charge and accuse Ehrlich Anthony Coker with the offense of Kidnapping.

For that the said Ehrlich Anthony Coker on the 2nd day of Sept., in the year Nineteen Hundred and Seventy Four, in the county aforesaid, did then and there unlawfully and with force and arms, did abduct and steal away, Elinta

Carver, a person, without lawful authority and held such person against her will,

Contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT NUMBER #4

THE GRAND JURORS, as selected, chosen and sworn for the County of WARE, in the name and behalf of the Citizens of Georgia, further charge and accuse Ehrlich Anthony Coker with the offense of Motor Vehicle Theft.

For that the said Ehrlich Anthony Coker on the 2nd day of Sept., in the year Nineteen Hundred and Seventy Four, in the county aforesaid, did then and there unlawfully and with force and arms, did take and carry away, with intent to steal the same, a certain motor vehicle, to-wit: one 1964 Chrysler, 4 door sedan, white in color, of the property of Allen Carver of the value of $600.00,

Contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT NUMBER #5

THE GRAND JURORS, as selected, chosen and sworn for the County of WARE, in the name and behalf of the Citizens of Georgia, further charge and accuse Ehrlich Anthony Coker with the offense of Escape.

For that the said Ehrlich Anthony Coker on the 2nd day of Sept., in the year Nineteen Hundred and Seventy Four, in the county aforesaid, did then and there unlawfully and with force and arms, after having been convicted of the offenses of Rape and Kidnapping in the Superior Court of the County of Richmond, State of Georgia; the offenses of Murder and Rape in the Superior Court of the County of Clayton, State of Georgia; and the offenses of Rape and Aggravated Assault in the Superior Court of Taliaferro, State of Georgia, did intentionally escape from Ware Correctional Institution in Ware County, Georgia, while under lawful custody of the Georgia Department of Corrections, and was there after retaken,

Contrary to the laws of said State, the good order, peace and dignity thereof.

I, Defendant Ehrlich Anthony Coker waive formal Ar-

raignment, and agree to strike from a panel of 42 Jurors and plead not guilty.

This 11th day of November, 1974.

E. KONTZ BENNETT, JR.
Defendant's Attorney

M. C. PRITCHARD
Assistant District Attorney

DEWEY HAYES, DISTRICT ATTORNEY,
Waycross Judicial Circuit

MOTION TO QUASH

Now comes the defendant above named, prior to arraignment and trial and moves the Court for order quashing the above described indictment and for grounds thereof shows the Court as follows:

• • • •

(3) Georgia Code Annotated, Section 26-2001 (Acts 1968, pp. 1249, 1299.) defines the crime of rape and providing for punishment by death is unconstitutionally vague, indefinite, discretionery and overbroad so as to violate the due process and equal protection clauses of the State of Georgia and United States Constitution.

(4) Georgia Code Annotated, Section 26-2001 (Acts 1968, pp. 1249, 1299.) defines the crime of rape and providing for punishment be death is unconstitutional in that it constitutes cruel and unusual punishment per se and as applied to defendant herein, in violation of the Eight and Fourteenth Amendments to the Constitution of the United States.

• • • •

(7) Georgia Code Annotated, Section 27-2534.1 (Acts 1973, pp. 159, 163) providing for application of the death penalty in Georgia is unconstitutionally vague, indefinite and overbroad and discretionary so as to violate the due process and equal protection clauses of the State of Georgia and United States Constitutions.

(8) Georgia Code Annotated, Section 27-2534.1 (Acts 1973, pp. 159, 163) providing for application of the death penalty in Georgia is unconstitutional in that it constitutes cruel and unusual punishment per se and as applied to defendant herein, in violation of the Eight and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE defendant prays for order of this Court quashing the above described indictment and for such other and further relief as may be proper.

/s/ E. Kontz Bennett, Jr.
E. KONTZ BENNETT, JR.
Attorney for Defendant

Filed in office this 11 day of November 1974.
W. H. Inman, Clerk

[Amendment to Motion to Quash]

AMENDMENT TO MOTION TO QUASH

Now comes the defendant above named and amends his previously filed Motion to Quash as follows:

(1) By inserting in paragraphs 1, 3, 5 and 7 the following citation to the due process and equal protection clause of the constitutions of the State of Georgia and of the United States, to-wit: Amendment v. Constitution of the United States (*Georgia Code Annotated,* Section 1-805); Amendment XIV, Constitution of the United States (*Georgia Code Annotated,* Section 1-815);

(2) By inserting in paragraphs 2, 4, 6, and 8 the following citations to the Eighth and Fourteenth Amendments to the Constitution of the United States, to-wit: Amendment XIV, Constitution of the United States (*Georgia Code Annotated,* Section 1-805); Amendment VIII, Constitution of the United States (*Georgia Code Annotated,* Section 1-808).

WHEREFORE defendant prays that this his amendments be allowed.

/s/ E. Kontz Bennett, Jr.
E. Kontz Bennett, Jr.
Attorney for Defendant

Filed in office this 15 day of November 1974.
W. H. Inman, Clerk

[Judgment on Motion to Quash]

JUDGMENT ON MOTION TO QUASH AS AMENDED

The defendant having filed a Motion to Quash on November 11, 1974 and Amended said motion by Amendment to Motion to Quash filed November 15, 1974, and same came on before the Court to be heard, and after hearing the argument presented and giving due consideration thereto said Motion is hereby Denied on each and every ground thereof.

And it is so ordered this 18 day of November, 1974.

ILLEGIBLE
Judge, Ware Superior Court

Filed in office this 2 day of December 1974.
W. H. Inman, Clerk

[Special Plea of Insanity]

SPECIAL PLEA OF INSANITY

Now comes the defendant through his attorney, E. Kontz Bennett, Jr. and enters this his special plea of not guilty by reason of insanity as provided under the Georgia Code Annotated, Section 27-1502.

/s/ E. Kontz Bennett, Jr.
E. Kontz Bennett, Jr.

Filed in office this 11 day of November 1974.
W. H. Inman, Clerk

[Plea of Insanity]

PLEA OF INSANITY

Now comes the defendant above named and through his attorney enters this his plea of insanity at the present time and requests trial by a special jury as provided by *Georgia Code Annotated,* Section 27-1502.

/s/ E. Kontz Bennett, Jr.
E. Kontz Bennett, Jr.
Attorney for Defendant

Filed in office this 15 day of November 1974.
W. H. Inman, Clerk

[Amendment to Special Plea of Insanity]

AMENDMENT TO SPECIAL PLEA OF INSANITY

Now comes the defendant above named and amends his special plea of insanity previously filed by adding thereto the following sentence: "Defendant also pleads that he is

now insane and unable to conduct his own defense and requests a special jury on said issue."

/s/ E. Kontz Bennett, Jr.
E. Kontz Bennett, Jr.
Attorney for Defendant

Filed in office this 15 day of November 1974.
W. H. Inman, Clerk

[Petition and Order for Mental Examination]

PETITION FOR EXAMINATION

NOW COMES E. Kontz Bennett, Jr., attorney for the above named defendant, and moves the Court for order directing the said defendant to be delivered to proper officials of the Ware County Mental Health office for psychiatric examination prior to his trial on the above charges, and for grounds thereof, shows this Court that the undersigned truly believes that such an examination is indicated in this matter.

WHEREFORE movant prays for said order for examination and for such other relief as may be proper.

/s/ E. Kontz Bennett, Jr.
E. Kontz Bennett, Jr.
Attorney for Defendant

Public Defender's Office
Waycross Judicial Circuit
Ware County Courthouse
Waycross, Georgia 31501

ORDER

THE FOREGOING petition having been read and considered, it is hereby ORDERED as follows: Let the Sheriff of Ware County, Georgia safely deliver the above named inmate/defendant to the Ware County Mental Health Clinic, 604 Riverside Drive, Waycross, Georgia at 9:30 A.M. on November 13, 1974, then and there to be examined by Dr. Mack Johnson, M.D., for the purpose of determining whether the said defendant was criminally responsible, i.e., whether he knew right from wrong, on the 2nd day of

September, 1974, and for the further purpose of determining whether the said defendant is mentally fit to stand trial for the above charges at the November, 1974 term of Ware Superior Court.

SO ORDERED, this 12th day of November, 1974.

George S. Heath
Judge, Superior Court of
Ware County, Georgia

[Transcript of Hearing on Petitioner's Motions,
Ware County Superior Court]

[November 19, 1974]

[H 8*] The Court: I call the case of the State versus Ehrlich Anthony Coker, being Case No. 5097.

Mr. Hayes: The State announces ready.

Mr. Bennett: Which case do you call?

The Court: 5097. The State versus Ehrlich Anthony Coker.

Mr. Bennett: That's the criminal case you call?

The Court: He is charged with five counts.

Mr. Bennett: That's not our special plea?

The Court: I'm calling the criminal case.

Mr. Bennett: Subject to hearing our motions and our special plea?

The Court: If you have any motions let's hear them right now. If there are any motions we will hear them now or we will forget about them. What motion do you want to hear first?

Mr. Bennett: Your Honor, if it please the Court, the first motion that I'd like to have heard is the motion to quash the indictment.

Ground 1 contends that the Georgia Statute 26-1902—and, if I may add, this motion has been amended by adding in the amendment specific citations, so when I refer to due process and equal protection clause I'm talking about those statutes and constitutions cited in my amendment.

Paragraph 1 moves to quash the indictment which defines

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* Page references to the transcript of the hearing on petitioner's pre-trial motions, paginated from 1 to 98, will be prefaced by "H".

the crime of armed robbery and provides for punishment of it by death.

THE COURT: I overrule that.

MR. BENNETT: Ground 2 moves to quash the indictment on the ground that the crime of armed robbery providing for the punishment of death is unconstitutional on separate grounds which are [H 9] enumerated in that ground.

THE COURT: I will overrule that.

MR. BENNETT: And Ground 3 is essentially the same, an attack on the crime of rape, which provides for punishment by death, and I move to quash the indictment on that ground.

THE COURT: I overrule Ground 3.

MR. BENNETT: And Ground 4—I move to quash the indictment for the crime of rape on another constitutional ground.

THE COURT: Overruled.

MR. BENNETT: Ground 5, against the crime of kidnaping, which is also punishable by death.

THE COURT: Overruled.

MR. BENNETT: And likewise Ground 6, a second constitutional ground against kidnaping.

THE COURT: Overruled.

MR. BENNETT: And, then, likewise, we attack on the same two constitutional grounds the Statute found at Georgia Code Annotated, Section 27-2534.1, which provides for the application of the death penalty.

THE COURT: Overruled.

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[H 12] THE COURT: . . . Now, we will proceed with the trial of the special issue of insanity at the time of the trial.

Bring the jury in.

(Jurors summoned the night of November 18, 1974, were then admitted into the court room.)

• • • •

[H 14] (A jury was empaneled and opening statements were made by counsel to the jury.)

EHRLICH ANTHONY COKER, defendant herein, was thereupon called as a witness in his own behalf, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. BENNETT) What is your name?

A. Ehrich [sic], Anthony Coker.

Q. Ehrlick [sic], do you remember talking to me back in September or October the first time I talked to you?

A. Yes, sir.

Q. Do you remember what we talked about?

A. I remember that you were appointed to represent me.

Q. That's all you remember about that conversation?

A. Yes, sir.

Q. Ehrlich, I want you to look up and talk loud enough so the jury can hear you because they're the ones who have got to make this decision. When you were a child did you have any blows to the head or anything like this?

A. Yes. I received a beat up side of my forehead with a baseball bat.

Q. All right, tell me how it happened.

A. Playing baseball and the fellow just swung and missed the ball and came around and knocked me out.

Q. Knocked you out?

A. Yes, sir.

Q. Were you totally unconscious?

A. Yes, sir.

[H 15] Q. How long were you unconscious? Do you know?

A. I don't know.

Q. But you were unconscious for a period of time?

A. Yes, sir.

Q. How old were you at that time?

A. Ten. Maybe eleven.

Q. Now, Ehrlich, have you ever been an excessive drinker of alcohol?

A. Yes, sir; I have.

Q. Will you tell me when you started drinking alcohol?

A. I became drinking heavy while I was in the service overseas.

Q. Where were you overseas?

A. Korea.

Q. All right?

A. I've had blackout spells, and I can't remember what happened.

Q. Are you saying that you actually blackout and lose consciousness when you are drinking?

A. Yes, sir.

Q. Did you ever find yourself waking up the next morning and not remembering what had happened after a blackout?

A. Yes, sir; many times.

Q. What about drugs? Have you ever been involved in those?

A. Barbiturates—a few.

Q. But it's never been a habit with you?

A. No, sir.

Q. Just alcohol?

A. Yes, sir.

Q. When is the last time you were drunk?

A. July, '72.

Q. Was that before you got arrested?

[H 16] A. Yes, sir.

Q. How frequently did you get drunk?

A. Practically every day.

Q. How much did you drink on those occasions?

A. Normally I drink until I was sick or, you might say, passed out.

Q. You drank until you got sick or passed out?

A. Yes, sir.

Q. Now, Ehrich, do you have memory lapses, or anything such as this??

A. Yes, sir; I believe so.

Q. Describe what these are to the jury.

A. Well, it's just like being locked up—I can do something one day and the next day I don't remember doing it. Somebody will tell me what I'd done.

Q. You're talking about maybe from one day to the next you don't remember what you did?

A. Yes.

Q. How often does this happen?

A. I really can't say. It's just when someone brings it to my attention.

Q. Ehrlich, have you ever heard voices talking to you?

A. Yes, sir; I have.

Q. When nobody was there?

A. Yes, sir.

Q. How often does this happen?

A. Pretty frequent.

Q. How often?

A. Three to four times a week. Sometimes more.

Q. What do these voices say to you?

[H 17] A. I just hear people calling my name. I'll sit up and ask who's calling, and the people who are with me just look at me like I don't know what's happening.

Q. Have you ever carried on conversations with these persons?

A. I really can't say.

Q. Have you ever talked back to them?

A. I've answered.

Q. Have they ever answered you back a second time?

A. I really don't know.

Q. Ehrlich, I'm going to ask you this direct question: Do you really understand what's happening here in this court room today?

A. I'm not sure.

Q. Do you know what we're trying to do here?

A. Trying to get me help, yes, sir.

Q. I beg pardon?

A. Trying to get me some help.

Q. Trying to get you some help?

A. Yes, sir.

Q. Well, do you know whether or not you are accused of any crimes?

A. I'm accused of this.

Q. Are you guilty of them?

A. I don't think so, no, sir.

Q. Do you know what might happen to you if we go on and try you for those crimes?

A. Yes, sir.

Q. What will happen?

A. I'll probably die.

Q. I beg your pardon?

A. They'll probably send me to the electric chair.

Q. Are you afraid of going to the electric chair?

[H 18] A. Not really, no, sir.

Q. You're not afraid of it?

A. No, sir.

Q. Are you saying that you're ready to die?

A. No, sir. I've just been in so long.

Q. Ehrlich, have you ever been evaluated for medical or mental problems in any other institution?

A. Yes, sir.

Q. Where?

A. Clayton mental health center when I was in jail.

Q. Any other times?
A. I saw Dr. Casey at Jackson Penitentiary.
Q. Any other time?
A. Not that I can remember.
Q. You don't remember any other time?
A. No. sir.

MR. BENNETT: You can cross examine.

CROSS EXAMINATION

Q. (BY MR. HAYES) You say you saw Doctor who?
A. Dr. Casey.
Q. Where did you see him?
A. Jackson Penitentiary.
Q. Where is Jackson Penitentiary?
A. Jackson, Georgia.
Q. When did you see Dr. Casey?
A. Either December or January, '73-74.
Q. Either December of '73 or January of '74? Is that right?
A. Yes, sir.
Q. Have you seen a doctor since that time?
[H 19] A. I talked to a doctor here in Waycross.
Q. What doctor did you talk to here in Waycross?
A. I don't know what his name is. I only saw him one time.
Q. When did you see the doctor here in Waycross?
A. Either last week or the week before. I'm not sure which one.
Q. Last week or week before?
A. Yes.
Q. And how did it come about that you went to see this doctor?
A. My lawyer set up an appointment for me to see him for the Court here.
Q. You say your lawyer set up an appointment for you?
A. Either that or the Court. I'm not sure which.
Q. What was the purpose of that? Trying to delay coming to court?
A. My lawyer feels like I need help.
Q. Now, what doctor did you see before the doctor in Jackson, Georgia? What doctor had you seen before that time?
A. I don't know what the doctor's name was. I only saw him once, maybe twice, at the Clayton Mental Health Center.

Q. At the Clayton Mental Health Center—what State was that in?
A. Clayton County, Georgia.
Q. When did you see this doctor?
A. The first part of '73.
Q. What doctor had you seen before that time?
A. None that I know of.
Q. You never have been committed to a mental institution, have you?
A. No, sir.
Q. So, none of the doctors you saw have committed you, did they?
A. Most of them didn't even do anything except talk to me for about five minutes and send me back.
Q. So, they said there was nothing wrong with you, didn't they?
A. I don't know.

[H 20] MR. BENNETT: Your Honor, I think that would call for a conclusion and hearsay.
THE COURT: Go ahead.

Q. (BY MR. HAYES) Is that correct—they talked to you about five minutes and sent you on back to where you came from?
A. Yes.
Q. You really never heard of this crazy business until your lawyer told you about it? Is that right?
A. Yes, sir; I've asked for help from the time I've been arrested.
Q. When was that?
A. When I was first arrested in July, 72.
Q. And did you see a doctor back in July, '72.
A. I don't believe so, no, sir.
Q. I believe you told your lawyer that a baseball or something hit you on the head when you were about ten or twelve? Is that what you said?
A. Yes, sir.
Q. Do you remember that?
A. I remember the hit, yes, sir.
Q. Did you ever go to see a doctor for that?
A. No, sir. I was at my grandmother's. She just kept me there.
Q. So you weren't hit hard enough to go to a doctor?

A. I don't know.

Q. Now, your lawyer asked you if you understood what you were doing here—you know what you're doing, don't you?

A. I'm trying to get help.

Q. You mean you're trying to get help to keep from being tried?

A. No sir.

MR. BENNETT: I object to that. I know he's on cross examination, but I think he's trying to testify for the witness. [H 21] He's trying to put words in his mouth.

THE COURT: Overruled.

Q. (BY MR. HAYES) You fully and completely understand what I'm asking you, don't you?

A. I believe so. You're trying to mess me up and make me say something that's not true.

Q. So, you think I'm trying to mess you up?

THE COURT: Let's don't argue with him. Don't argue with him.

Q. (BY MR. HAYES) Tell me when you first came in contact with your lawyer over there.

A. September.

Q. What part of September?

A. The first part of September.

Q. If you recall, what date was that?

A. I'm not sure. I was brought to jail and kept in a cell by myself.

Q. What date were you brought to jail in September?

A. 2nd or 3rd.

Q. 2nd or 3rd of September?

A. Yes.

Q. And once you got in jail who was the first person you talked to? Let me ask you: Who arrested you and brought you to jail?

A. I don't know. Quite a few people.

Q. Who brought you into the court room this morning?

A. A detective is all I know.

Q. You don't know his name?

A. No, sir; I don't know any of the ——

Q. I beg your pardon?

A. I don't know any of the officers' names except the Sheriff.

Q. If you were brought to jail on the 2nd or 3rd of September [H 22] of this year how long was it before you saw your lawyer, if you know?

A. Within a week.

Q. And, where did you first see him?

A. In jail.

Q. How many times have you seen him since that time?

A. Two or three.

Q. Would you tell us how old you are?

A. Twenty-five.

Q. Would you give the date of birth?

A. 31st of August of '49?

Q. 31st day of August of 1949?

A. Yes, sir.

Q. And where were you born?

A. Atlanta.

Q. Atlanta, Georgia?

A. Yes.

Q. What was your father's name?

A. Jasper.

Q. Jasper what?

A. Coker?

Q. And what was your mother's maiden name?

A. Anderson.

Q. What was your grandfather's name on your father's side?

A. I never met him. I don't know.

Q. You say you never met your grandparent on your father's side?

A. No.

Q. What about your grandparents on your mother's side?

A. My grandfather was James.

Q. Your grandfather on your mother's side was James?

A. Yes.

Q. James what?

A. James Anderson.

[H 23] Q. Your grandmother, now, on your mother's side, what was her maiden name?

A. I don't have any idea.

Q. You don't know?

A. No.

Q. What grade in school did you go through?

A. I finished the 10th.
Q. You finished the 10th grade?
A. Yes. In High School.
Q. And what High School did you go to?
A. Walter George.
Q. Where is that located?
A. Atlanta.
Q. And what year did you finish the 10th grade?
A. I believe it was '67. I went in service that year.
Q. You finished in '67 and you went into service following that, and how old were you when you went in service?
A. Seventeen.
Q. How long did stay in the service?
A. Three years.
Q. Where all did you go while you were in the service?
A. Korea, California ——
Q. What part of the Army were you in?
A. Infantry.
Q. Where did you first go to?
A. Fort Benning, Georgia.
Q. What city is Fort Benning in?
A. I'm not sure. I wasn't there but two months.
Q. Do you know where Columbus, Georgia, is?
A. Approximately.
[H 24] Q. Where is Fort Benning in relation to where Columbus is?
A. Columbus.
Q. I beg pardon?
A. Columbus.
Q. So, Fort Benning is in the edge of Columbus, is it not?
A. Yes.
Q. How long did you stay at Fort Benning?
A. Eight weeks.
Q. What type training did you take at Fort Benning?
A. Infantry Warfare.
Q. Infantry Warfare?
A. Yes.
Q. Now, why eight weeks of Infantry Warfare training?
A. I signed up Infantry.
Q. That's the normal length of time course, isn't it?
A. Yes, sir.
Q. How did you come out of your rifle scoring?
A. Mostly expert and sharpshooter.

Q. What type rifle were you using?
A. M-14.
Q. M-14?
A. Yes, sir.
Q. Is that a modified version of M-1?
A. Yes, sir.
Q. How did you do with your carbine?
A. M-14 is the only one I've ever fired.
Q. And you say you were expert and sharpshooter?
A. Yes.
Q. And when you left there where did you go to?
A. Fort Ord, California.
Q. What was the purpose in going to this place in California?
[H 25] A. Secondary Infantry training——Warfare.
Q. How long did you stay there?
A. Eight weeks.
Q. What type training did you take there?
A. Machinegun; motar.
Q. What about handgrenades?
A. Yes. Warfare.
Q. Do you know how to ignite a handgrenade?
A. Yes, sir.
Q. How do you ignite one?
A. Just pull the pin.
Q. That's what they call the "pineapple"? Is that right?
A. Yes, sir.
Q. Did you ever use the machinegun?
A. Yes, sir.
Q. What kind of machinegun did you use?
A. M-60 and M-50.
Q. 50 and 60? Is that right?
A. Yes.
Q. On the 60, approximately how many rounds will that fire per minute?
A. I don't have any idea.
Q. Now, when you went in the service, what was your score?
A. I don't have any idea. I never saw my score.
Q. Do you know what your GED test was in high school?
A. No, sir. I passed it.
Q. I beg pardon?
A. I passed the GED.

Q. I might have asked you the question before, but I don't mean to —— Do you know what your IQ test was?

[H 26] A. No, sir.

Q. Now, when you were in Fort Benning taking this eight weeks of training, you passed it all right, didn't you?

A. Yes, sir.

Q. All right, when you went on to California and took your next eight weeks that was advanced training, wasn't it?

A. Yes, sir.

Q. You passed that all right, didn't you?

A. Yes, sir.

Q. And what other type training did you have in service?

A. Artillery.

Q. How long did you take Artillery training?

A. I was in an Artillery unit thirteen months in Korea.

Q. Thirteen months?

A. Yes.

Q. What kind of rank did you have in Artillery?

A. Spec. 4.

Q. Now, that's the same thing as a T Sergeant, isn't it?

A. The same as a Corporal.

Q. So you were what amounts to a Corporal in a specialized unit? Is that right?

A. Yes, sir.

Q. And, to do that in Artillery you're involved in a certain amount of trigonometry, are you not?

A. In a way.

Q. And did you pass that all right?

A. Well, the only thing I really had to do was pull the lanyard. All I did was fire.

Q. You didn't have any problem doing that, did you?

[H 27] A. No, sir.

Q. Have you had any type injury since the time you told about when the ball hit you on the head when you were about ten or twelve?

A. I was thrown off of a train.

Q. When was this?

A. In September.

Q. September what year?

A. This year.

Q. Where did this take place?

A. In Ware County.

Q. Here in Ware County?

A. Yes, sir.

Q. Did you go to the hospital?

A. I couldn't.

Q. What part of your body get hurt, or did any of it get hurt?

A. I was bruised and cut all over.

Q. You didn't get any injury on your head, did you?

A. I really can't say.

Q. But you were never put in a hospital [sic] for this?

A. No, sir. I was thrown in a cell by myself.

Q. You were what?

A. I was thrown in a cell by myself by the Sheriff.

Q. You were put in a cell by yourself?

A. Yes, sir.

Q. Can you tell me any reason why your mind wouldn't be just as good now as it was when you went in the service?

A. I don't know.

[H 28] Q. You fully understood the questions I asked you, did you not?

A. Yes, sir.

Q. As a matter of fact, you remembered the answers to almost all those questions, didn't you?

A. They were things that's just part of me.

Q. Are you married, or have you ever been married?

A. I was married.

Q. Are you separated or divorced now?

A. Separated.

Q. I gather by that that you are not divorced? Is that right?

A. I really can't say. I'm not sure.

Q. As far as you know you're not divorced? Is that right?

A. Yes.

Q. Do you have any children?

A. Yes, sir.

Q. How many children do you have?

A. One.

Q. And what's the name of the child?

A. Ehrlich.

Q. Is it a boy or girl?

A. Boy.

Q. How old is it?

A. Almost two.
Q. Now ——

MR. HAYES: We have no further questions. You can come down.

MR. BENNETT: Come down.

(The witness retired from the stand.)

[H 29] E. KONTZ BENNETT, JR., was thereupon called as a witness in behalf of the defendant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. STRICKLAND) State your name for the record, please.
A. Kontz Bennett, Jr.
Q. Mr. Bennett, are you licensed to practice law in this State?
A. Yes, sir.
Q. And have you on past occasions prior to this date had occasion to prepare the defense in criminal cases?
A. Yes, I have.
Q. On more than one occasion?
A. On many occasions.
Q. Have you prior to today had any communication with the record section of the Department of Corrections in Atlanta, Georgia?
A. Yes, sir. I have.
Q. Was that on more than one occasion?
A. Yes, sir.
Q. And have you, sir, had occasion to petition this Court for an evaluation of the defendant Coker?
A. Yes, sir; I did.
Q. And was this done sometime prior to today?
A. Yes, sir. It was done about a week and a half ago.
Q. Do you recall if there was such an evaluation completed on the defendant Coker?
A. Yes, sir; it was done.
Q. And by whom, if you know?
A. Dr. Mack Johnson, who is the psychiatrist—a new psychiatrist at the Mental Health Clinic here in Ware County.
Q. Mr. Bennett, have you had occasion to make a trip to the [H 30] Georgia Diagnostic Classification Center in Jackson, Georgia?

A. Yes, sir. When I got the date set down for the doctor to—you see, the doctor is only here on certain days of the week, so, when I found out the exact date the doctor would be talking to the defendant I got in the car and drove up to Jackson, Georgia, to get his classification summary. I just got a copy of it. It's a compilation of different tests, such as high school tests, and so forth, given to him since he's been in the prison system, and it indicates the penal system's evaluation. I felt like it was information that Dr. Johnson should see if he wanted to, and, so, our purpose was to get it and make it available for whatever he wanted to do with it.
Q. Have you, in fact, made that information available to Dr. Johnson?
A. Yes, sir. I took it to him on the day that the defendant was evaluated.
Q. Did he use this in his evaluation of Mr. Coker?
A. Well, he'll have to testify to that.
Q. Mr. Bennett, prior to today's date have you had occasion to interview the defendant Coker?
A. Yes, sir; several times.
Q. Will you tell this Court and jury in your professional opinion as an attorney whether, based on your interviews, he could assist you in the preparation of his defense in this trial?
A. Yes, sir. I'd like to tell the jury what I know about it, and I'd like the jury to understand that I'm not trying to testify as a psychiatrist. I have one here that'll do that. It is my professional opinion, based on my experience with other defendants, that this man is definitely disturbed and in need of considerable amount of help. It is also my opinion, based on [H 31] my talking to him in my investigation of the case, that he is unable to give me substantial facts in the case. For whatever reason, I don't know. I think the psychiatrist can shed some light on it. For example: My initial interview with him was just as he testified, on or around September 4th, and at that time he related in his own words—or he tried to relate in his own words—what happened in this chain of events, and he related that there was an escape from the prison, and that when they escaped, somehow he was aware that some of them might have gotten on a train and were gone, but that he missed the train and he wound up at a house, and he said he went in the house

and he found a friendly girl there, just as friendly as she could be; that when he had sexual intercourse with her she was very willing; she enjoyed it; that when they left—now, I'm mixing up the interview. I'll come back—that when they left—when they left the scene, that she got in the car and sat right next to him and held his arm and was just as friendly to him as she could be; that at one time while he was in the house he said, "Now, I want you to go get me a knife so I can hold you guard—hold it over you," and he said that the girl just went and got it and brought it back to him.

Now, getting back to that initial interview—on that initial interview when I talked to him, he related some of those same facts, but when he got down to the part talking about the girl he looked me straight in the eyes and he said, "I didn't touch her." Now, my first reaction was that, "Here's a man that's trying to jive me. He's trying to tell me what he thinks I ought to know." And I'd expect this. And I started to write it off, you know, just to that; but I talked to him more and I realized that he was firmly convinced that he didn't; and then [H 32] a few days after that a commitment hearing was held, and the record clearly indicated, based on the testimony of this young lady who will testify in the main trial, that he did, in fact, touch her, and when I confronted him with that he said, "Well, but it was like this," and I just related to you that the fact that he said she enjoyed it. He did not come out and say it, but I got the impression hat he felt she was seducing him, almost. But, be that as it may, that's just a conclusion I came to. And then I went to some of my literature and read what I could find on the newly disturbed sex offender, and I found that this is a class of symptom of a disturbed person who commits a sex crime, that is, that he thinks his victim wasn't a victim at all, but the victim, if not quite initiated the act, was a willing and joyful participating partner. Well, this seemed to fit him to a "T", and it was at this point—well, also, in the interim I have received a letter from him which is very disturbing to me. We were tied up in court and I was unable to be going up to the prison where he was to talk to him, but I received the first letter from him, and he seemed totally unaware at that time what was going on about him. He was aware that there were charges pending against him, but he wasn't aware, or didn't seem to me to

be aware, that these charges could result in his death if they were found to be true, and, so, that plus my research—and I have the letter here which I would like to read to the jury. I feel like the letter is evidence that the jury can make its own decision on. I'm telling the conclusion I came to after reading it, and I think you should have the benefit of whatever information I have in arriving at this judgment.

[H 33] Q. I show you now, Mr. Bennett, this letter that you say you got from the defendant Coker.

A. Yes, sir; this is the letter, along with the envelope that it came in. Let him identify that.

(The letter referred to was thereupon marked for identification "D-1".)

MR. PRITCHARD: We have no objection.

THE COURT: Admitted without objection.

(The letter referred to was thereupon received in evidence.)

THE WITNESS: Now, I realize that the letter might contain some things that might tend to compromise Mr. Coker, and this is just a chance I'll have to take. I feel like it's a matter of your needing to know all the facts. The letter reads: "September 28, 1974." In the upper left hand corner "Mr. E. Kontz Bennett, Jr., Attorney at Law, Ware County Courthouse, Waycross, Georgia, 31501.

"Re: Ehrlich A. Coker, D-13676, H-2-23, GD & CC." That stands for Georgia Diagnostic and Classification Center, which is at Jackson, Georgia. "P.O. Box 3877. Jackson, Georgia, 30233.

"Dear Sir:

"I am writing to ask if there is any news on the charges pending against me there. Your assistant who represented me on September 16th, 1974, talked to me briefly after the hearing. I asked him to try to arrange a plea for concurrent sentences. Could you tell me whether anything has been decided on this year.

"Also I ask that if possible can you arrange it where the three of us will not be returned to Ware C. I. at all prior to court or during court. They continue to punish us [H 34] when we arrive thereby putting us in the hole, refusing to feed us, unable to smoke, no privileges of any sort are we allowed there. I am in the Adjustment Center here which is punishment in itself, but I still eat and smoke and have the

necessities. If possible arrange for us to go directly from here to court and if there is any hold over, please try to have us held at the jail rather than at Ware C. I. Sincerely, Ehrlich A. Coker."

Now, I didn't read anything from the envelope. It's just a regular envelope.

Now, as I said, when I read this letter I had not had the benefit of any psychological evaluation. I was not aware of anything that had been done at Jackson, but it struck me in that letter that here was a man facing a capital trial, that is, a trial in which he might get the death penalty, and it struck me as being very blase—just very disinterested, and it concerned me, and at this time, of course, he had already denied that he touched the little girl. I had already had the benefit of the commitment hearing where they said—where the evidence was that he definitely did, and he was so positive about the fact that he didn't touch the girl; and then there was the letter, and the letter just seemed to all kind of bring it together, and that's when I went to my book and found that this is indeed a class of symptom, this detached and disassociated feeling toward what he's charged with. That's when I thought it would be proper to seek medical help for him, and I honestly felt like I did it as soon as I possibly could. In any event, the doctor examined him, and I went up and got some records for the doctor to have and he'll come in here and testify to you.

Another thing that I have subsequently found out is an indication of this, and that is the fact that at the very [H 35] beginning he's been saying that he will be prosecuted. He has a phobia about getting in trouble in prison—about other inmates trying to kill him because he apparntly testified in a prior trial—turned State's evidence or something like this. I don't know what happened, but he apparently testified against someone, as a result of a plea barganing [sic] process, and ever since then he's felt like his life is in danger, and I think the psychiatrist can tell you that he's really concerned about this to an abnormal extent. This is just another symptom of the problem that I'm trying to point out to you. Of course, the doctor will be more technically specific.

Q. (BY MR. STRICKLAND) Mr. Bennett, based on your prior experience as counsel, is the necessity of cooperation of and by the defendant in a criminal case part of what is

known as the due process of law? In other words, must that be present in order for you to make a proper defense?

A. Yes, sir. If that's not there, I can't follow up all the leads. I can't look at all the applicable law. I'm just severely hindered in the preparation of the defense. I'm shooting in the dark, as it were. I don't have anything concrete to go on. I can't trust my own client. I understand that's normal in most cases for there to be a lack of trust. We handle a lot of criminal cases, and we handle the defendant for free, as far as they are concerned. We are paid by the taxpayers and they don't know who we are and have no particular reason to trust us, so we have to be very careful about trying to gain their respect. I never could do it with Ehrlich. I had to get him before the doctor and get some understanding before I could ever get to that point, because that was just a few days ago, and I still don't feel like I'm communicating with [H 36] him at all.

MR. STRICKLAND: Thank you. You can cross examine.

CROSS EXAMINATION

Q. (BY MR. HAYES) Mr. Bennett, would you be so kind as to tell me what year you finished the 10th grade?

A. The 10th grade?

MR. STRICKLAND: Your Honor, we object to that.

THE COURT: Well, let's see if he knows.

THE WITNESS: What year did I finish the 10th grade?

Q. (BY MR. HAYES) Yes.

A. Well, I finished high school around 1956.

Q. Did you say you finished the 10th grade in '56? Is that what you said?

A. Yes, sir; I graduated in '59—I mean—this was '57. Excuse me. '56-'57 was probably the year of my 10th grade. I graduated from high school in '59. That's going back two years.

Q. Have you decided what year it was now?

A. It was the school year of '56-'57. That's the best I can say. I could be wrong.

Q. You noticed your client didn't have that much trouble remembering, did he?

A. I thought he had a remarkable memory for things that far back, but it's my experience that that's not at all uncom-

mon, especially in people with deranged minds. They seem to have a very clear memory of things that went on in the deep, dark past.

Q. Do you know what date you actually went to see him in September?

A. Yes, sir.

[H 37] Q. What date did you go to see him?

A. The date that I first testified to.

Q. What date was that?

A. September 4th.

Q. Do you know what date he was put in jail?

A. It was the night of September 2nd or morning of the 3rd.

Q. I notice in this letter, Mr. Bennett, I notice this gives a Jackson address at the time it was written.

A. Yes, sir.

Q. Was he actually in Jackson at this time when he wrote the letter?

A. In my opinion he was there, yes, sir.

Q. Is this the correct address he gave you?

A. That's the address he gave me.

Q. Is that correct so far as you know?

A. So far as I know.

Q. As a matter of fact, he was picked up and put in jail here and then they sent him to Jackson to be held till we got him back? Is that correct?

A. I don't know about that. He was removed from the jail here where we couldn't get to him last term.

Q. He was removed from the jail here and removed to Jackson? You know that because you went up there, don't you?

A. No, sir; I didn't know where he was till I got that letter. When I went up to Jackson he was already back here.

Q. Now—

A. (Interposing) Understand, I'm not trying to argue with you. I just don't know. I don't know what the orders were. When I asked [H 38] the judge for an order to have him brought down here I just mailed it to Atlanta. I didn't know which prison he was at.

Q. In his letter he refers to you having an assistant? Is that not true?

A. Yes, sir.

Q. Do you have an assistant?

A. Yes, sir.

Q. Who is your assistant?

A. Mr. C. Dean Strickland.

Q. You heard him say that he had actually talked to your assistant, did you not?

A. Well, I was not at the commitment hearing. I assume he did. He mentioned in the letter he did.

Q. That makes good sense, doesn't it?

A. I don't know what you mean.

Q. Well, he knew who our assistant was? And he knew you?

A. We gave him our names and adresses when he left.

Q. He understood that Mr. Strickland as your assistant? He knew that, didn't he?

A. I would assume he did from what he said in the letter.

Q. I notice he said here, "I asked him"—talking about our assistant—"to try to arrange a plea for concurrent sentences." Is that what he says in this letter?

A. That's what the letter says, yes, sir.

Q. That he asked your assistant to try to arrange a concurrent set of sentences? Is that correct?

A. Yes, sir.

Q. Tell the jury what he means by "concurrent sentences."

A. All right, sir, I'll be glad to, and then I'd like to also explain my answer by giving why I thought that was unusual. The law says that if a jury sets a sentence in a case, or a [H 39] judge sets a sentence, that he may determine whether or not sentences will be concurrent or consecutive. Now, if a sentence is concurrent, the effect of it would be that if he got a sentence for ten years and a sentence for five years, they would both start running on day one, and it would date back to the day he first went to jail, and he would get credit for all the jail time, and he would only have ten years of total jail term that he would be facing, and that he would probably be out on parole after he had served one-third of the ten year period. A consecutive sentence, if ten years and five years were consecutive, and had been properly made so, that he would serve the ten year sentence and then begin serving the five year sentence, and he's talking here about making what we can get by way of a plea for him from you as the District Attorney concurrent with what he's already serv-

ing. Now, at this time I'd like to explain my answer. That was unusual, because at my first interview he knew—he was aware of the sentences that he was serving. He made me aware of it. He was serving sentences for murder, for kidnaping—no. Hand me my file. I'd like to base what I'm saying on my actual notes that I made at the time. He related to me that he was serving a life sentence for rape—

Q. (Interposing) Let me ask you something at this point so I won't have to come back to it.

A. All right.

Q. You said he related to you at that time he was serving a life sentence for rape? Is that right?

A. Yes, sir.

Q. Have you checked it? Is that true?

[H 40] A. That's very true. And that he was serving a life sentence for murder.

Q. All right, let me stop at this point. Did you check that?

A. Same answer. Yes, sir; I verified that.

Q. Is that true?

A. Yes, sir. And, then, he related he was serving other charges out of other counties.

Q. Have you checked that, Mr. Bennett?

A. Yes, sir.

Q. Is that true?

A. And he was serving those sentences of twenty years, twenty years and eight years; and, he's aware of all this. I'm not trying to say that he wasn't; and I subsequently verified it by checking the records of the counties where these convictions actually took place.

Q. So you verified all these for yourself, did you not?

A. Yes, sir; but I'm not quite through with what I wanted to say about your question about concurrent sentences. It struck me as a little incongruous at first that he understood so much about his prior sentences. He knew that, and yet he denied having anything whatsoever to do with this girl. He just denied anything at all. It couldn't have been except for the fact that they did ride in the car. He just denied any physical contact with her. He said she was a good girl. He said she was really trying to show him how to get back on the road to Atlanta and as soon as she pointed that out he was going to let her out, but he denied having any sexual or physical contact with her. Well, like I say, the first impression was that it was just the normal response that you get

from a prisoner like that, especially one who is charged with a serious crime, but when I got that letter I realized that here was a man who had spent a considerable [H 41] period of time in jail and had already been sentenced for this many crimes similar to the one he is charged with now, and that he thinks that I can get him a consecutive sentence, and I knew to myself that that was—

Q. (Interposing) Excuse me. You mean concurrent.

A. I mean concurrent. And I knew to myself that there was something wrong somewhere with that fellow; and that's why it was important to me, Mr. Hayes, and I don't mind you reading the letter and that's why I'm going to offer it to the jury.

THE COURT: Let's move on, gentlemen. Now, we've gone over that same thing twice.

Q. (BY MR. HAYES) Let me ask you one other question and then I will stop—two or three questions: Isn't that the most routine and ordinary thing for a person who wants to enter a plea to try to get the sentence to run concurrent?

A. Mr. Hayes, my experience has been that those that you call normal, the average convict, hardened criminal, I imagine knows what he's doing—knows better. He may want it, but he knows better.

Q. Don't they try to get you to get it for them?

A. Well, we are told to try to get it, but he knew better. I knew that he should have known better.

Q. He told you to try to get it, didn't he?

A. Either I or Dean.

Q. One other question and I'll stop: Isn't it true, then, as a matter of reality, that if he could have got these sentences to run concurrently like he wanted that really his sentence would have been nothing?

A. Well, I really can't say, because I don't know how much time he's got left to serve, but it would have added a lot more time [H 42] to it.

Q. I believe you've already told us he had two life sentences, and so on, didn't you?

A. Yes, sir.

Q. So, another life sentence wouldn't mean anything, really, would it?

A. "Well, no, sir.

THE COURT: Let's don't get into an argument now. You can come down.

(Witness excused)

THE COURT: Call your next witness.

CLARENCE M. JOHNSON was thereupon called as a witness in behalf of the defendant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. BENNETT) Would you state your name, please?

A. Clarence M. Johnson.

Q. Now, Dr. Johnson, you are a medical doctor?

A. Yes, sir.

Q. What is your address?

A. Office address is 520 Ocean Boulevard, St. Simons Island. Residence is 1909 Dixon Drive, St. Simons Island.

Q. Do you also practice here in Waycross?

A. I'm consultant for the Mental Health Center here in Waycross.

Q. Now, will you tell the jury, please, sir, what educational qualifications you have? Where did you do undergraduate work?

A. University of Tennessee.

Q. What type of degree did you obtain there?

[H 43] A. I obtained a BS Degree.

Q. Bachelor of Science?

A. Yes.

Q. Did you go to medical school?

A. Yes.

Q. Where?

A. University of Tennessee College of Medicine, Memphis, Tennessee.

Q. What year did you finish there?

A. 1960.

Q. Did you have any internship following that?

A. Yes.

Q. For how long?

A. One year general rotating internship, Athens General Hospital, Athens, Georgia.

Q. And did you have a residency?

A. Yes.

Q. Was that immediately following the internship or did you practice a while?

A. I was in the general practice of medicine for ten years.

Q. And where was that?

A. Eastman, Georgia.

Q. And then did you go into a residency?

A. Yes.

Q. Was that before or after your general practice?

A. That was after.

Q. And what did you specialize in?

A. Psychiatry.

Q. Where did you have your residency?

A. University of Tennessee College of Medicine.

[H 44] Q. And when did you finish that?

A. August, 1974.

Q. August of 1974?

A. Yes.

Q. And are you now licensed to practice psychiatry in the State of Georgia?

A. Licensed to practice medicine.

Q. And you are practicing the specialty of psychiatry?

A. Yes.

Q. Dr. Johnson, I'll ask you if on or about the date of November 13, 1974, you had occasion to evaluate an individual named Ehrlich Anthony Coker.

A. Yes.

Q. I'm going by your report here. I don't know the date that you did this. Would you, please, sir, tell the jury in your words, but in words that they can understand, what you did in your investigation and what you found and what your feelings about psychiatrically are at this time? Relate your examination to the jury.

A. Mr. Coker was given a general psychiatric evaluation. This involves obtaining psychiatric history as well as the terminating evaluation of the, we call mental status, which is the psychological or the thinking state of the individual at the time that we are examining him; hopefully also to reflect upon previous mental conditions or mental states. This involved approximately forty-five or fifty minutes in an interview type of situation where I talked with the individual —talked with Mr. Coker and asked him questions in reference to determining some mental status or some feeling of

his psychological capabilities. With Mr. Coker I did not reach a diagnostic conclusion as far as a definite diagnosis. I felt that other [H 45] studies were indicated. I did find several areas that concerned me about psychological stress or behaviors that the individual had had in the past that appeared to be abnormal or out of context or not within keeping with other—with considered the normal individual; and, of course, normal is what I consider to be sane.

We made some recommendations after our evaluation, and it was felt that these involved more testing—detailed testing—that would help me evaluate, or help anyone evaluate, some areas of the psychological processes that go on in these individuals. This we call psychological testing. Many of you know the mosaic block test, or something along that line.

Also, I felt that an electroencephalogram, which is a brain wave study, should be done to determine the possibility of organic or what we call lesions or scar tissues or things in the brain that should be excluded. My basic feelings were . . . that the possibility of an underlying psychological disorder or an abnormal personality development, an abnormal emotionality was evidently in Mr. Coker.

Q. Doctor, could you explain what you're talking about when when you talk about a normal personality involving Mr. Coker? Be a little more specific in that.

A. Well, in view of the history of stated accusations against Mr. Coker which—

Q. You can go ahead and talk about whatever you think is necessary in this case.

A. Well, I would say basically haters [sic] that we talked about, and this involved his inability to control impulses at times—his explosiveness, if we can say, his aggressiveness sometimes, especially when under the influence of alcohol, the intensity [H 46] with which he reacts at times appears to be what I consider a little excessive, or a great deal excessive, and out of the contact of normal behavior that we would expect of an individual.

Q. You are referring to explosive behavior—would you define that to the jury?

A. Well, this is behavior that is aggressive to the degree that it may inflict injury upon someone or upon themselves —physical injury.

Q. Would it be that that when it comes upon him he can control?

A. Well, to the degree that in the past this has not been the state or fact with Mr. Coker.

Q. You say he hasn' controlled it in the past?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Are you talking about the prior times he's been arrested, the prior times he's been in fights, or whatever?

A. I don't know each specific time, but the times in question that we talked about were his inability to cope with criticism. He would fight often as a child. He would be very combative, very sensitive, very overly active.

Q. Now, with respect to his childhood, did he relate to you any traumatic experiences that he might have had that might have some bearing on his conduct today?

A. Well, he related a very unhappy and traumatic—there was a lot of hostility in the family, a lot of cursing, fighting, arguing, a lot of drinking, that he felt very little emotional attachment to his immediate family at all, other than I believe a grandmother.

Q. Did he refer to receiving a blow on the head in his initial [H 47] interview with you? You may refer to your notes if you have them.

A. In the history of trauma, the only thing that I obtained from Mr. Coker was that he received an injury as a small child, I think, probably—I forget the exact age, but it was in school years, with a baseball bat, I believe, delivered accidentally by his brother in a baseball game, that rendered him sort of addled or semi-unconscious, or sort of saw stars. This was the only traumatic history to the brain, or to the skull, I should say.

Q. Now, Doctor, did you have a history of excessive use of alcohol?

A. He stated that through his tenure in service, in the Army, I believe it was, military service of whichever branch, that he did drink quite excessively, and that after his discharge he consumed alcohol daily over a period of several years.

Q. Up until he was arrested, possibly?

A. I believe that was right.

Q. Now, Doctor, what, if any, connection might there be organically between this blow on the head as a child and/or excessive alcohol intake, or possibly any other physical

trauma that he might have been subjected to, and his present condition—the psychiatric disorders you referred to?

A. Upon my notes, at the time of evaluation on November 13th, this year, I do not see evidence of organicity.

Q. By that what do you mean?

A. By that I mean organic changes or destruction of brain cells that you sometimes see from alcohol, that results in what we consider a difficulty in certain functions of the mind. I didn't find enough substantial findings on my initial evaluation to make a diagnosis of this. One thing that I was concerned [H 48] about the possibility of what we call temporal lobe seizure disorder, which is recorded in some cases of acute, aggressive, destructive behavior in individuals that suffer from this disorder, and, of course, this is why I recommended electroencephalogram as to exclude this as a possibility.

Q. Now, could the alcohol have had any effect on the temporal lobe seizure disorder?

A. I think it is established by research that this does enhance the seizure potential.

Q. It doesn't cause it, but it can aggravate it or change the potential or some other effect?

A. Yes, this is possible.

Q. Now, based on your evaluation, since you didn't reach a firm diagnosis, but based on your evaluation do you have reason to think as an expert opinion that there may be a relationship, or that further testing is needed?

A. Well, this was my recommendation, yes.

Q. It was your specific recommendation?

A. Yes.

Q. Now, may I then say—I'm not trying to put words in your mouth, but may I say that that you feel there is a possibility that this temporal lobe seizure disorder exists?

A. Well, again, when we're trying to derive a diagnosis of a specific disorder, all of our diagnostic orientation is potent. In other words, testing is very beneficial to exclude these possibilities. We always have to entertain them as possible.

Q. I understand you won't exclude it, but I'm asking to go a little bit further. If you can't say so, but can you say if there is any evidence of what you found that there may be such a temporal lobe disorder.

A. Only what I have stated—the explosiveness of the [H 49] behavior is characteristic of this pattern.

Q. In other words, he exhibits symptoms of that disorder, or one symptom of the disorder?

A. Yes, I could say that.

Q. Now, Doctor, you referred to his affect and his home—I'm talking about in being with you and talking to you and communicating with you—will you explain to the jury exactly what you mean by that?

A. Well, when we speak of affect we're thinking of the emotional qualities in an individual, whether they have feelings, actually. Quite often when you talk with someone you can tell whether they are happy or sad or whatever.

Q. May I ask you, are you talking about a situation where a man has done something to make him real happy he would exhibit a feeling of happiness, or if he'd done something to give him a lot of trouble he would feel some remorse or guilt or some feeling for what he'd done and show appreciation of his act?

A. This is really what affect is.

Q. Go ahead.

A. And my notation during the interview was, if I can—can I—during the interview and upon reevaluation after the interview I felt that Mr. Coker definitely had a disturbance in affect or feeling tones, and we discussed certain areas of development, certain people in his life, certain behaviors in his life, and there was a blandness to it, no reaction at all, with elation or happiness or sadness or remorse.

Q. Doctor, would it surprise you to learn that earlier today Mr. Coker testified that he wasn't afraid to die, that he'd been in jail so long he was just ready to die? Would you think that would be inappropriate based on what you learned about him?

[H 50] A. Well, this, I think, is inappropriate—

Q. (Interposing) I'm not talking about a normal person. I'm talking about would it be inappropriate for him?

A. Well, basically, in a severe degree of disturbance of affect, this wouldn't be inappropriate.

Q. Would not be inappropriate?

A. No.

Q. And your recommendation as a result of your evaluation was, and I quote: "More intense psychiatric evaluation would be desirable so that the patient's behavior could be more adequately observed over a period of time and treatment modalities instituted if necessary?"

A. Yes.
Q. Those are your words?
A. Yes.
Q. Now, Doctor, you also referred to him being detached from stressful events—I think you said in your report: "In view of his inappropriate affect or feeling tones along with explosive and impusive behavior that is sometimes combative and his emotional detachment from stressful events that have happened in the past, it appears we are dealing with an underlying psychiatric disorder." Now, what you're talking about there is emotional detachment from stressful events—what do you mean by that?
A. This I referred to previously, I think—his affect. There were various areas of stress discussed, and he was detached emotionally. There were no feeling tones associated with these behaviors or these acts.
Q. By that are you saying that he didn't particularly feel like what happened was a bad thing or was wrong, or more to [H 51] the effect that he didn't feel like it was any wrong thing to be attributed to him? I'm not trying to put words in your mouth. There, again, I feel like some further elucidation on that might be helpful.
A. My feeling was that the intensity of this detachment, of the lack of emotional concern, was to a pathological [sic] degree, that this was due to psychological [sic] disturbances. By this I mean they were an inability during his development never to develop attachments or emotional relationships, and that obviously if you've never had them you don't know what they are.
Q. Would this also be the time when he would be learning right from wrong?
A. This would be in his formative years.
Q. In your opinion did Mr. Coker learn right from wrong as he was growing up?
A. From the history I obtained from his early behaviors that have been sort of anti-social, or against society, his juvenile record, failure to learn from his behavior, from experience, I would say that his ability to feel guilt associated with acts as to whether they are right or wrong, his decisive opinion probably is impaired.
Q. Decisive what, now?
A. His decisive opinion of what's right or wrong probably is impaired.

Q. Now, you said that you were of the opinion that his inappropriate affect was pathological—so severe that it was pathological. Would you explain that, please, sir?
A. This, I think we have probably gone over again. This is the fact that lack of emotional attachments and the lack of communication with fellow human beings is to such a degree that [H 52] it appears that he has no ability to form any attachments, and this, I think, is in reference to the normal individual impaired, or we call pathological. It's not within the realm of normalcy, and then we consider it abnormal or pathological.
Q. But you're also saying that this inappropriate affect is very severe in his case?
A. I consider it to be pathological.
Q. Now, Doctor, what did his feeling seem to be about the crime that he's charged with with respect to this girl? Did you go into that with him at all?
A. We allowed him the opportunity to talk abotu it, and he did not elaborate to any degree. He was confronted with the charges that were against him and he had very little reaction to them. Sort of an indifference or lack of—
Q. Concern?
A. Concern.
Q. In other words, this would be another symptom of his inappropriate affect on his part?
A. Yes. This would be an example.
Q. Doctor, as a matter of fact, isn't the net result of this inappropriate affect you're talking about the same thing as saying, in layman's terms, how tough you are?
A. Well, this is an area that I don't think we could describe as out of contact with reality, as such, as with terms of psychosis or psychiatry. I think that it is out of contact with the normal behaviors.
Q. This is a copy of your report, is it not?
A. Yes.
Q. And you have the original of that report?
A. I believe I have a copy of it.
Q. This was prepared by you?
[H 53] A. Yes.
Q. Did you sign this?
A. Yes.
Q. You signed the original?
A. Yes.

MR. BENNETT: May it please the Court, at this time we'd like to tender this into evidence.

MR. HAYES: We object to the report. The doctor can testify whatever he wants to. We object to the report.

THE COURT: Objection sustained.

(BY MR. BENNETT) You didn't have anything to do with the preparation of the report or the psychological work that was done at Jackson, did you?

A. No, sir.

Q. Did you read over that material?

A. Yes, I did read it over.

Q. Now, Doctor, let me ask you this: When you were talking to Mr. Coker did he act like he was trying to fox you into thinking he was mentally sick, and trying to give you the answers that he thought you wanted to hear or that he thought would make him lok like he was sick or mentally disturbed?

A. No, I did not get that impression.

Q. I beg pardon?

A. I did not get that impression.

Q. Well, what was the impression you got in this regard?

A. I think that I stated he was cooperative and showed, I thought, a perceptive attitude to some degree of the interview.

Q. If anything, would you say that his answers to your questions might tend not to help him in this regard so far as feeling that he's crazy?

[H 54] A. Well, I don't think I could say whether they would help him prove that he was or wasn't.

Q. Well, what I'm asking, would you say that to a certain extent in some of his answers he was actually hurting himself, or didn't realize he wasn't helping himself by the way he was being so honest with you in giving his answers? Would you say that?

A. Well, I thought that the information I obtained was not colored to too much of a degree.

Q. Now, did he relate anything about the fact of discharge from the service?

A. Yes. He did.

Q. Did you find any psychiatric significance to the fact—what kind of discharge did he tell you he got?

A. He told me he got an honorable discharge.

Q. Did you find that to be psychiatrically interesting in any way in the case?

A. Yes, sir; I did.

Q. Will you explain that to the jury?

A. From the history of his earlier years and his involvement in delinquent activities, being involved with the juvenile authorities, and I believe it was my impression that he was sort of progressed into the service rather than probably having to do time—

Q. For some juvenile crime?

A. For some pending crimes. This was an impression I had, and wasn't confirmed, actually, or substantiated. Obviously there were three years of service, and there was some period of adjustability, I guess, which was a little different from his pattern or his post pattern.

Q. His personal pattern?

[H 55] A. Yes.

Q. Would you say that at the time he was in service, assuming he did, in fact, get the honorable discharge, that is, he wasn't subject to any major disciplinary actions, or psychological reasons——

A. Assuming that this information could be verified.

Q. Do you think it might be strange or a significant fact that that he did, in fact, complete the Army successfully?

A. Yes.

Q. Now, when he talked to you did he freely admit or talk to you about these prior charges that he's serving time for now?

A. Yes, we did discuss them.

Q. He didn't try to hold that back from you?

A. He talked in sort of generalities about these.

Q. In generalities?

A. Yes.

Q. Did he exhibit this detachment which you referred to when he talked about this?''

A. I thought so.

Q. Now, Doctor, do you think it would be unusual for a man like Mr. Coker—now, we're talking about Mr. Coker based on what you know about him—do you think it would be unusual for Mr. Coker to tell me the fact that the victim of this crime was really a very willing copartner in the physical part?

A. I can say, first, that with his feeling of detachment

from emotional involvement, I imagine this could have been the case.

Q. Do you think that would be more or less an appropriate reaction from him?

A. This is speculative.

Q. It wouldn't really surprise you?

A. If he made that statement. As far as the validity of it, I [H 56] would question.

Q. Well, I'm not talking about the fact that it's true. I'm just talking about Mr. Coker—is that normal coming out of his mouth?

A. Yes.

Q. Now, Doctor, in your opinion does Ehrlich Coker know right from wrong?

A. At this time I don't think I could answer that.

Q. What would it take to give you an opinion on that?

A. I think it would be what I further recommended.

Q. Further examinations?

A. And observations of behavior.

Q. Well, do you feel like there is any way at all that you could come to a conclusion? Can you express any kind of conclusion or opinion at this stage about him?

A. Other than the basic feeling from the limited information that I do have, plus the limited observation, that we have a basic behavior disorder, what we call a disturbed individual who does not react in a pattern that is acceptable to society.

Q. And, what does that mean with respect to him, whether or not he knows right from wrong?

MR. HAYES: Your Honor, he's already asked that question over and over.

THE COURT: I think he has, too. Let's go on with something else.

Q. (BY MR. BENNETT) Will you express an opinion on that?

A. Repeat the question again.

Q. I'm asking what affect, what that might mean, with respect to his ability, to his knowledge of right and wrong today.

MR. HAYES: Now, we're getting into what the Court ruled [H 57] out.

THE COURT: What is the question?

MR. BENNETT: Whether or not he has an opinion at this time as to whether he knows right from wrong.

THE COURT: I thought he had already answered that question.

MR. BENNETT: He said he didn't feel like he had enough information to get a definite medical statement, and I'm asking him if he entertains an opinion.

THE WITNESS: I don't think I could make that.

THE COURT: He just stated he didn't.

Q. (BY MR. BENNETT) Sir?

A. I believe I referred to the fact that I don't think at this time I could do that, without the——

Q. That you would not be able to express an opinion?

A. Right. That is, of this magnitude I don't think I can.

Q. Well, now, based on your knowledge of his continued violation of the law, and assuming that this criminal record and juvenile record that he's related to you is true, would that indicate anything from a performance or behavior standpoint that might tend to indicate whether he knows right from wrong?

A. Of course, the pattern of not learning from experience, this could be compatible with inability to formulate the ability to perform as is expected in society.

Q. Now, would you say that this bland emotionless lack of affect, or inappropriate affect, continued down to today so far as you know in Mr. Coker?

A. At the time I examined him—I haven't observed him that much today.

Q. Now, did you inquire of any possible delusions of his?

A. This I obtained from his previous record that was available to [H 58] me. From you, I believe.

Q. What did you find out, Doctor?

A. This was the impression of a previous examiner. I myself referred to it as being observed by another professional as a possibility. I personally did not find any delusional——

MR. HAYES: (Interposing) Your Honor, we object to him going any further. He said he could not find any, and we object to any more as highly speculative.

Q. (BY MR. BENNETT) Doctor, what IQ did he have?

A. It was my impression without definite testing that he was low normal.

Q. What opinion did you have as to his ability for abstraction and his judgment and insight?

A. They were poor.

Q. Doctor, is there anything else that you can tell us about this individual at this time?

A. No.

MR. BENNETT: You may cross examine.

(Whereupon, at 12:27 P. M., November 19, 1974, a recess was taken.)

AFTER RECESS

1:45 P. M., November 19, 1974.

THE COURT: All right, you may proceed.

DR. C. M. JOHNSON was thereupon recalled as a witness for cross examination in behalf of the State, and testified as follows:

CROSS EXAMINATION

Q. (BY MR. HAYES) Doctor, are you familiar with the McNaughton test?

A. Yes.

[H 59] Q. Just in a very few words, will you tell us what it is?

A. This is a legal determination aimed at deriving at whether an individual can determine right from wrong.

Q. Talk so the jury can hear you.

A. This is a law, actually, that has been adopted to determine if individuals can determine right from wrong.

Q. Do you remember what that case was based on?

A. I would have to refresh it a little bit, but vaguely I can recall it. It is related to a situation of a court case in England back in—I believe it was the early part—well, it was the turn of the century—the early part of the twentieth century—it was actually the nineteenth century, in the 1800s—the courts were concerned about individuals being aware or able—for the courts to be able to determine individuals—if they knew what they were doing—were able to determine if they could distinguish what was felt to be right or wrong for this behavior. Actually, the case involved one of the nobles, I believe, in the court system, and it was felt that they had no law at that time that could allow for considera-

tion of people—individuals—that could not differentiate this point of view, and that knew what they were doing, and actually they could determine whether this act was wrongful or not.

Q. What it actually held, Doctor, wouldn't take but about one sentence to tell, would it?

MR. BENNETT: If it please the Court, we'd like to interpose an objection on two grounds at this point. The first is that the doctor is very competent and has been qualified as a medical expert, but I think he would be first to state that he is not here to testify as a legal expert, and we object to this line of questioning as calling for legal expositions—

THE COURT: (Interposing) Well, he said that he was [H 60] familiar with this particular matter, as I understand it.

MR. BENNETT: We also object to it on the ground that the McNaughton right-wrong test is not the criteria in this hearing.

THE COURT: I will charge the jury properly on that.

MR. BENNETT: We think it's irrelevant. I think it's just taking up time.

THE COURT: All right, overruled. Let's move along with it.

Q. (BY MR. HAYES) Go ahead, Doctor, and state what you were fixing to tell the jury.

A. Well, actually, this was one of the first tests to determine an individual's capacity to answer for his behavior in terms of legal description. This was a legal and not a medical decision. It was rendered in the courts, and we know it as a test of individuals' ability to determine right from wrong.

Q. What you're really saying was that if a fellow knew that it was wrong to commit a crime he would be subject to be punished? Isn't that what the case said, Doctor?

A. Well——

Q. Do you recall where he said, "I'm going to kill the so and so even if they electrocute me"? Isn't that what it passed on?

A. Well, of course, I look at it as a perspective of history, and I'm not that familiar with the details of the case.

Q. Doctor, I noticed earlier that you used the term "psychotic"—when you use the term "psychotic" you're not referring to a person who is insane, are you?

A. Well, sometime it's felt that—in the field of psychiatry

it has been sort of comparable in lay terms, and "insane" and "psychosis" can sometime be interpreted as the same.

Q. No, I'm asking is it ordinarily synonymous?

[H 61] A. Not ordinarily.

Q. So, when you refer to somebody as being psychotic you're not trying to say they're insane, are you?

A. Well, insane, of course, is a vague term which I don't have an adequate definition for.

Q. Let me ask you something: When you tested him, about how long did you stay with him?

A. I'd say within forty-five or fifty minutes.

Q. So, the scope of your examination lasted somewhere around forty-five or fifty minutes? Is that correct?

A. Yes.

Q. Had you seen him prior to that time?

A. No.

Q. Had you ever seen him prior to that time that you know of?

A. No.

Q. Have you ever treated him since that time?

A. No.

Q. What date did you see him?

A. I think it was the 13th of this month—November.

Q. Doctor, you've read other doctors' reports, have you not, in this case?

A. I read one, I believe.

Q. Did you read one from J. F. Casey, a psychiatrist, dated November 15th, 1974, out of Atlanta, Georgia?

A. Yes.

MR. BENNETT: If it please the Court, we're going to object to his eliciting any statements from that report in front of this jury. We refrain[ed] from doing it because it would be the rankest form of hearsay. Now, he can ask the doctor his opinion about the same areas covered in that other report. I [H 62] don't think there is any way that he can take statements from that report and use them for impeachment or for any other purpose in this trial, because it's clearly just a copy, and we object to him eliciting any direct statements or quotations from the report that has been furnished.

THE COURT: The objection is sustained.

Q. (BY MR. HAYES) Let me ask you this: Do you know Dr. J. F. Casey?

A. No, I don't.

Q Do you know of him?

A No.

Q. You do not know him by reputation?

A. No.

Q. Tell me this: What does the medical term "anxiety neurosis" mean, Doctor?

A. This is a state—an emotional state in an individual that is suffering from chronic stresses which can be related to multiple factors, financial or worried about various interpersonal relationships with others. Sometimes a lot of these concerns are not consciously known to the individual. This is a way that the body and the brain or the mind have in handling the stresses of the unpleasurable feeling tones.

Q. Let me ask you something, Doctor: Would it be fair to say, then, that it is common to a business man whose business is getting a little bit slow, or something?

A. Well, we all have anxieties, but we think in terms of an anxiety neurosis in terms of a diagnostic category in psychiatry—we think of extreme degree of anxiety more than probably the unusual that we are accustomed to.

Q. Doctor, when you examined him did you have an examination [H 63] made to determine the presence of organic brain disease?

A. Yes, in brief.

Q. What did you find? Did you find that he had organic brain disease?

A. That was not my impression from what I was able to at this one interview.

Q. You did not find any, did you?

A. No.

Q. All right, sir. Doctor, did you give him an X-ray examination?

A. No.

Q. Did you give him a physical examination?

A. No.

Q. Doctor, did you give him what is commonly known as the EEG test, to test the electrical impulses and brain waves, and so forth? Did you give him that test?

A. No.

Q. Doctor, don't you think it would have been helpful to give an X-ray examination to try to determine if he had any physical or mental disability?

A. I felt that this would probably have been indicated, maybe. I have found no evidence at this time X-rays could have been beneficial.

Q. What about the EEG test on the electrical impulses, and so on? Don't you think that would have been important to determine the person's state of mind?

A. Yes, I did.

Q. Did you give it to him?

A. I recommended it. I did not have the facilities available.

Q. Has it been made to your knowledge?

A. Not to my knowledge.

[H 64] Q. Did you give him the EEG test to determine his nervous condition—his nervous reflexes?

A. I didn't give him an EEG test.

Q. As a matter of fact, the only thing you actually did with this fellow, he came into your office in Brunswick? Is that right?

A. In Waycross.

Q. And you talked to him some forty-five minutes? Is that correct?

A. That is correct.

Q. Did you determine before you talked to him that he already had a court hearing?

A. At the time I was not knowledgeable of this.

Q. Did you ask him?

A. Yes.

Q. Did he know who you were, Doctor?

A. Yes.

Q. Did he know who he was?

A. Yes.

Q. Did he know who his lawyer was?

A. Yes.

Q. Did he know why he came before you?

A. Yes.

Q. Did he know what day of the month it was?

A. He did.

Q. Did he know the possible legal consequences of the crime that he committed, the rape and the robbery and so forth?

A. He said he did.

Q. Did he claim any previous insane condition?

A. He talked in reference to whether he thought he had

a mental condition. He related that he felt that he did.

[H 65] Q. That's when he was talking to you?

A. Yes, sir.

Q. But, actually as far as you could actually find and know, you could not find any of that and know it, could you, Doctor?

A. Well, I was only relating with the individual.

Q. Was his memory good for ordinary events?

A. For recent recall I thought it was good. For remote or past distant things I thought it was a little poor for that to some degree.

Q. Doctor, I believe you've already said you hadn't talked to him since that time?

A. No.

Q. I believe you've already stated, though, that you haven't actually reached any medical opinion in the case whatsoever? Is that correct?

A. I was unable to determine a diagnosis, right.

THE COURT: Is that all for this witness?

MR. HAYES: Yes, sir; he can come down.

(Witness excused)

THE COURT: Call your next witness.

MR. BENNETT: We rest.

J. E. MURRHEE was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Would you state your name for the record, please?

A. J. E. Murrhee.

Q. By whom are you employed, Mr. Murrhee?

A. Sheriff's Department of Ware County.

Q. Were you so employed back in September of this year?

[H 66] A. Yes, sir.

Q. Mr. Murrhee, I will ask you if you know the defendant Coker over here.

A. Yes, sir.

Q. Did you have an occasion to see him on or about the second or third day of September?

A. Yes, sir.

Q. Where did you first see him, Captain Murrhee?
A. At the back of the Ware County Jail at the court house.
Q. And when was that?
A. That was the night he was picked up by the Sheriff and deputies.
Q. Did you have occasion to talk to him?
A. Yes, sir.
Q. Did you observe him?
A. Yes, sir.
Q. Did you go in just general conversation with him?
A. Mr. Coker was brought into the Ware County jail. I advised Mr. Coker as to who I was, and I advised him of his rights, and I asked him some questions.
Q. When you advised him who you were and advised him of his rights what was his answer to it?
A. He was advised of his rights and he was asked if he understood them and he said "Yes".
Q. What did you ask him then?
A. I asked him if he would like to discuss this case—talk about this case that he was charged with. He said no, he had nothing to say. He wanted to talk to a lawyer.
Q. Did you talk to him the following day?
A. The next morning.
[H 67] Q. Where did this take place?
A. In my office.
Q. So we can get it in the record, your office is in the Sheriff's Department at the court house? Is that right?
A. Yes, sir.
Q. About what time of the day was this?
A. That was the day following the escape from Ware C. I. GBI Agent Hatchett, Sergeant Watts and myself brought Mr. Coker down; he was advised of his rights again; he was asked if he wanted to discuss the case; he said he had nothing to say—he wanted to talk to a lawyer. At that time the necessary papers were filled out to appoint him an attorney.
Q. When you asked the ordinary questions did you get ordinary and reasonable answers?
A. Yes.

Mr. Bennett: We object to that. That would call for a conclusion on his part. He can state what the response would be and let the jury decide.

The Court: Objection sustained.

Q. (By Mr. Hayes) Did you observe anything you considered abnormal about him?

Mr. Bennett: I object to that. That calls for a conclusion.

The Court: He can state what happened and what he observed. I will let him give an opinion after he has stated the facts.

Q. (By Mr. Hayes) Mr. Murrhee, have you talked to him since that time?
A. Yes, sir.
Q. How many times have you seen him and talked to him since that [H 68] time?
A. I have talked to him on two or three occasions since that time.
Q. When was that, Mr. Murrhee [sic]?
A. The other day I transferred Mr. Coker out to the Mental Health Center for evaluation by Dr. Mack Johnson.
Q. Did you talk to him on that day?
A. Yes, sir. There was small conversation.
Q. Did he know who you were?
A. Yes, sir.
Q. Did——

Mr. Bennett: (Interposing) Now, may it please your Honor, I think that calls for another conclusion on his part.

The Court: Overruled.

Mr. Bennett: He can state what they talked about, but that calls for a conclusion.

The Court: Overruled.

Q. (By Mr. Hayes) Where did you take him?
A. I took him out to the Board of Health building out on Riverside.
Q. Did he know and understand where you were taking him?

Mr. Bennett: We object. That calls for a conclusion.

The Court: I overrule it.

Q. (By Mr. Hayes) Mr. Murrhee, did he know and understand where you were taking him?
A. I told him where I was taking him and he made the remark to me that he didn't know if they had a psychiatrist here. He did not use the word "psychiatrist". That they

had a Board of Health here, or Mental Health Building here.

Q. On the way back did you talk to him?

A. As we came out the building I told him I wasn't going to handcuff him, but after we got to the car I did handcuff him. I [H 69] put the handcuffs on him when we got in the car. He made the remark to me that he thought things would be all right for him; he thought he had something going for himself.

Q. He said he thought he had something going for himself?

A. Yes.

Q. In your opinion, with all these answers, were his answers normal to you in your opinion?

MR. BENNETT: If it please the Court, we object to that.

THE COURT: I will sustain that. I will let the jury decide that.

Q. (BY MR. HAYES) All right, based on all this information you just testified to, would the man be sane?

MR. BENNETT: Objection. That calls for a medical conclusion.

THE COURT: Sustained.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. BENNETT) I take it the first time you talked to him you went through the required procedure relative to giving him his rights, and so forth, and then asked him did he want to talk to you, and he said, "No?"

A. That's correct.

Q. Was there any further conversation?

A. Other than the fact he said he wanted a lawyer.

Q. Was there any other conversation?

A. Not with me and him that night, no.

Q. Now, the next day you got him down out of the jail, and you had with you who?

A. Sergeant Watts and GBI Agent Hatchett.

Q. And who else?

[H 70] A. Nobody else.

Q. Three of you in the room? What room did you all go into?

A. My office, which is the usual place we take a man for fingerprinting and mugging.

Q. That's the room that we get together in?

A. Yes.

Q. And three, and these were all deputies or GBI Agent? Is that correct?

A. Yes.

Q. And the three of you brought him down and you went through the rights again, in other words, protecting his rights, advising him, and so forth, and then asked him did he want to talk to you and he said, "No?"

A. That's correct.

Q. Now, what other conversation was there?

A. To my knowledge, not a lot. At that time I got up and left. They were going to fill out the papers for him.

Q. And then that's when I was notified that he was there?

A. Yes.

Q. Did you try to talk to him again after that other than when you took him to the Health Department?

A. No.

Q. To your knowledge did any other person try to talk to him?

A. That I have no knowledge of, no.

Q. Now, when you drove him out to the Mental Health Department you told Mr. Hayes that you thought he knew who he was—what did he say to make you think that?

A. That he knew who I was?

Q. No, you told Mr. Hayes that he knew who he was. Did he ask you did he know who he was and know who you were?

A. I understood Mr. Hayes to ask me did Mr. Coker know me.

Q. And your answer was, "Yes, he did?"

[H 71] A. Yes.

Q. Why do you think he knew you?

A. Well, he's heard my name, and I believe that he called me by name when we started to get in the car.

Q. You believe he did? You're not sure?

A. I'm not positive, but I believe he said "Captain Murrhee."

Q. Well, you were in uniform that day, weren't you? When I saw you at the Health Department you were in uniform, weren't you? Wasn't that the day of the funeral?

A. I don't remember.

Q. Wasn't that the day of the Cady funeral and you had your Captain's bars on you? You are a Captain, aren't you?

A. Yes. I really don't remember that.

Q. All right, what else did he say to you? I'm trying to get the conversation on which you're basing your opinion?

A. Other than the fact that I told him where we were going, and he said that he didn't know there was a place like that here.

Q. Did he say anything about why he was going there?

A. Not at that time.

Q. Well, at any time?

A. No.

Q. What else did he say?

A. That was about the conversation.

Q. The only thing he said to you was that, "Hello Captain," or something like that, and he didn't know there was a Mental Health Building here?

A. He did not know there was one.

Q. You really didn't have that much conversation with him, then, did you?

A. No.

[H 72] Q. And all you were saying to the jury was that in your opinion he knew who you were?

A. That's right.

(Witness excused)

HARRY WATTS was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) State your name for the record, please.

A. Harry Watts.

Q. By whom are you employed, Mr. Watts?

A. Sheriff's office of Ware County.

Q. Were you so employed back in September this year?

A. Yes, sir; I was.

Q. Do you know the defendant Coker in this case over there?

A. Yes, sir; I do.

Q. Did you have an occasion to see him on or about the 2nd of September this year?

A. Yes, sir; I did.

Q. Where did you first see him, Sergeant?

A. The first time I saw him was in the briefing room at the back part of the jail.

Q. Was that in the court house?

A. Yes, sir; Sheriff's office.

Q. When was this, Sergeant?

A. This was on the morning of the 3rd, I think it was.

Q. Did you talk with him or did anybody talk with him in your presence?

A. Yes, sir.

Q. Tell me what was said by you or some other people in your presence.

[H 73] A. He was advised of his legal and constitutional rights. He was asked if he wanted to make a statement or talk about the incident that had occurred. He stated that he did not; that he didn't want to say anything until he had his attorney present.

Q. Now, did you see him at a later time?

A. Yes, sir; I did.

Q. When did you next see him, if you recall?

A. Later that morning.

Q. Did you have any conversation with him at that time?

A. Yes, sir; I did.

Q. What was that?

A. He again was advised of his legal and constitutional rights. We had him in our office. Myself and Captain Murrhee had him in our office along with Bill Hatchett, Agent for the GBI. He was advised of his rights, and I had the papers present to be filled out for an attorney, and information was taken from Corporal Herrin's fingerprint cards, and at that time I fingerprinted him.

Q. Did you observe any act or conversation with him at that time which was other than normal?

MR. BENNETT: We object to that. He can state what the conversation was, but whether it was normal or abnormal is a question for the jury to decide.

THE COURT: Objection sustained. Just state what you observed.

Q. (BY MR. HAYES) Have you seen him since that time, Sergeant?

A. Yes, sir. I have.

Q. Have you observed him since that time?

A. Yes, sir; I have.

Q. About how many times have you seen him since that time?

A. I don't know exactly. Probably a half a dozen.

[H 74] Q. Based on your conversations with him at different times do you have an opinion as to whether he was sane or insane?

A. Yes, sir.

MR. BENNETT: I object to that. That's a conclusion that the jury is called on to decide.

THE COURT: All right, sustained.

MR. HAYES: You may cross examine.

MR. BENNETT: No questions.

(Witness excused)

W. E. STRICKLAND was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) State your name for the record.

A. Sheriff W. E. Strickland.

Q What position do you hold in Ware County?

A. Sheriff of Ware County.

Q. Were you Sheriff during September of this year, Sheriff?

A. Yes, sir; I was.

Q. I will ask you, Sheriff, if you were on duty back on the 2nd of September this year.

A. Yes, sir; I was.

Q. Sheriff, do you know the defendant Coker sitting over here?

A. Yes, sir; I do.

Q. And is he in the court room, Sheriff?

A. Yes, sir; he is, sitting over there side of Dean Strickland.

Q. Sheriff, did you have an occasion—excuse me—when did you first observe this defendant?

A. Mr. Hayes, I don't have my records with me, but that date you called there was after midnight. Is that what you want me to [H 75] tell?

Q. Yes.

A. We ran up behind him on U.S. 82 West, and I passed him——

Q. Let me ask you this: Were you looking for him?

A. Yes, sir; I was.

Q. All right, whereabout on U.S. 82 when you went past him, Sheriff?

A. Just east of the old K. S. Varn farm on U.S 82.

Q. So we can get it straight, U.S. 82 is a paved highway? Is that correct?

A. Yes, sir; on the Pearson Highway. Better known as the Pearson Highway.

Q. What direction would that be from Waycross?

A. He was traveling west.

Q. So, he was traveling west, and about how far out of Waycross was he when you first observed him?

A. Approximately fifteen miles.

Q. What kind of motor vehicle was he traveling in, Sheriff?

A. A white '64 Chrysler New Yorker with an aerial on the back.

Q. And who was driving?

A. Mr. ——

Q. The defendant?

A. Yes, sir.

Q. Sheriff, did you observe anyone with him when you first observed him on the highway?

A. Mrs. Carver was sitting right up under him with his arm around her neck.

Q. And once you observe the car, was that the car you were looking for, Sheriff?

A. Yes, it was, Mr. Hayes. I will have to go into detail.

[H 76] Q. Let me ask you the details. At this point, I believe you've already stated you were looking for this man and this car? Is that right?

A. Yes, sir.

Q. And, when you observed him at this point out on U.S. Highway 82 tell us what you did, Sheriff.

A. We had a look-out for a white '64 Chrysler driven by the defendant accompanied by a young lady. I gave orders for each vehicle to take a different road and we set up roadblocks in Douglas, Pearson, and Willacoochee, Homerville and Georgia 122. My son and I were driving at a high rate of speed. We had word that he was going to Atlanta, and I ran up behind him in the middle of a curve and ran up on him before I knew it was him, so, thinking fast which would

be the best, I passed him, hoping that he wouldn't recognize me, to get some back-up units to come in to help stop him, because, you see, the girl sitting right close to him we didn't want to stop him at that time; so, after I passed him, we got on past Benny Hill's home, just before you come into the Silas Douglas old home place section, so the hills start up and down between there and Floyd Davis, and I lost his headlights, so I immediately turned around and went back to the first cross road west of the old K. S. Varn farm where we'd lost him, and the State Patrol came to me and all of my units, and we had road blocks put up and I gave orders for us to run out every three-path road and every road to find out which way this car had gone. I made the road to the left. Corporal Dunsmore and Patrolman Ammons turned to the right. Just before I was fixing to turn in to the right he hollered on radio and says, "Sheriff, we have found the car and the people." I said, "Stay there. I am coming up." We did. Myself, along with my two [H 77] boys, Henry and Jimmy, which are both special deputies, we ran up there past Patrolman Dunsmore on the left, and they jumped out of the car and got him out of the car and I put the handcuffs on him and advised him of his rights, led him over and put him in the back of the patrol car, where we brought him to town.

Q. What kind of car were you riding in, Sheriff?

A. I was driving a '72 Mercury.

Q. Was it marked?

A. No, sir. It has a radio aerial on the back and government tag. As far as marked like my other patrol cars with stars, and all, it doesn't have that, but it has blue lights under the grill and has a radio aerial and a government tag on the back. You can identify it by that.

Q. You say when you passed him you took a side road to the left?

A. Yes, sir; after I'd passed him and he passed the first cross roads there at the K. S. Varn old farm, better known to some people as the television tower road, this was the first cross road to the right after you pass there west.

Q. Sheriff, when you arrested him did he know who you were?

A. I advised him who I was. I told him I was Sheriff Strickland, and that I was advising him of his rights and asked him did he understand. He shook his head that he did.

Q. Did he do anything unusual at the time?

A. He knew he was incarcerated and I think he acted real well under the circumstances. He didn't give any trouble at all.

Q. On the way back did he say anything to you?

A. Mr. Hayes, he wasn't in the car with me coming back. After I locked him in the patrol car with the screen with Henry Strickland and Officer Dunsmore, I followed them on back to town.

Q. Sheriff, since that time since you've had him in the jail—[H 78] he's been in Jackson part of that time—have you ever had occasion to observe him?

A. Yes, sir; I have.

Q. Have you observed him today since he's been in here?

A. Yes, sir; I have.

Q. Just generally seeing him, what is your observation now with reference to the other times you've seen him?

A. Very normal. Nothing out of the normal at all.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Sheriff, when you say he acted normal, you're talking about normal in relation to what you've seen in the past, aren't you?

A. Absolutely, just like me or you.

Q. You're not talking about normal in an absolute sane sense, are you?

A. I don't know. I'm not a psychiatrist. I can't go into that, Mr. Bennett.

Q. You're talking about normal, how he's been acting since he's been back to what he was before.

A. I don't know how he was acting prior to that.

Q. You're talking about while he was in jail?

A. Yes.

Q. Sheriff, you said you passed him on the paved highway at a high rate of speed?

A. Yes, sir. He was running about forty-five or fifty, Mr. Bennett.

Q. Coming toward town?

A. No, sir, he was traveling west. Both of us were traveling west, and I ran up behind him, and I had to do some fast thinking—what was the best for the welfare of the occupant in the car [H 79] with him, and I passed, and as soon as I passed I started radioing to my back-up units.

Q. I understand. How long were you behind him?

A. Oh, just a short time. There's a curve just like this (demonstrating), and I ran up on him at the far end—at the west end—of the curve, and I passed him just before you get to the old K. S. Varn farm on the TV tower road.

Q. I was trying to find out how long you had him in your sight.

A. Mr. Bennett, I don't know. I picked him up with the headlights for a good distance, but, actually, where I could observe two in the car was a very short distance.

Q. In terms of seconds, now, would you say a second or two before you decided to pass him, or what?

A. I'd be scared to say, but it was a very short time.

Q. Well, the reason I'm asking, Sheriff, you said he had his arm around the girl in the car. How can you be sure when you only had such a short time to observe him?

A. Mr. Bennett, if you'd been on the road nearly thirty years like I have you make a habit of that to save your life.

Q. Well, what did you see to make you think he had his arm around her?

A. I saw the back of his arm on the seat rest on the back of the car.

Q. Did he have it around her neck?

A. No, behind her.

Q. I thought you said he was hugging her.

A. No, sir.

Q. That wasn't what you testified?

A. No, sir.

Q. Now, you said he turned off to the left?

[H 80] A. I said he turned off to the right. I said I turned off to the left. He turned off to the right at the old Silas Douglas road, which is the first graded road after you pass there, and it goes down about six-tenths of a mile.

Q. Yes, sir; I understand. You don't know why he turned off?

A. No, sir; I don't.

Q. You're not telling the jury he turned off in response to you, are you?

A. I'm not telling them nothing, because I couldn't read his mind.

(Witness excused)

BRUCE BROWN was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Would you state your name for the record, please?

A. Bruce Brown.

Q. What position do you hold with the State of Georgia?

A. Warden, Ware Correctional Institution, Waycross, Georgia.

Q. Do you know the defendant Coker in this case?

A. Yes, sir.

Q. How long have you been knowing him?

A. If I'm not mistaken, he came to our institution in the early part of '73. The early part of '74. Excuse me. The early part of this year.

Q. Were you in weekly contact with him?

A. In daily contact.

Q. In daily contact?

A. Yes, sir.

Q. Did you talk to him day in and day out?

A. No, sir.

[H 81] Q. Did you observe him day in and day out?

A. Yes, sir.

Q. Did you talk to him occasionally?

A. Yes, sir.

Q. While you observed him did you ever observe him when he looked any way other than normal?

A. No, sir. I couldn't tell any change in him.

Q. What about talking to him—did he talk and act normal to you?

MR. BENNETT: We object to that. I think the thing he can testify to is how he acted. He can testify how he acted in relation to other times he talked to him.

THE COURT: Tell how he acted, then, Warden, if you know.

THE WITNESS: Nothing out of the ordinary. The length of time he was in my institution he had one disciplinary court, and this was for refusing to work. Other than this he had no problems whatever. He made a good adjustment there.

Q. What about on September 2nd—what did the defendant do at that time?

A. He escaped on this date.

Q. Will you tell us how he escaped?

A. Well, during a routine Alcoholic Anonymous meeting

he and two fellow inmates escaped by tearing out through the chapel ceiling and tearing out through the eaves of the chapel building onto the roof of the main institution, jumping off and escaping into the woods.

Q. (By Mr. Hayes) Warden, was that something that would take pre-planning to set up to do it?

A. I would think so.

Q. You say he went through the roof up there?

A. Yes, sir. He tore through the ceiling of the chapel, which [H 82] is ceiled with possibly ⅜ inch plywood ceiling. They went through a fire escape door there and then into the loft, and with a heavy instrument tore out the weatherboarded end of the chapel. The chapel is not a maximum sort of security prison, and the end that was torn out is weatherboarded with common sheeting.

Q. What time of day or night was this?

A. This was approximately 8:00 P.M. on the night of September 2nd.

Q. And how were the guards set up at this particular time with reference to the chapel where he was at this meeting?

A. Well, the officer that was observing or monitoring the meeting was abducted and was unable to report to the gate officer that any insurrection or any type escape plot was in progress.

Q. What do you mean by "abducted," Warden?

A. Well, several of the inmates, including Mr. Coker there——

Mr. Bennett: May it please the Court, I think we ought to object to this as being entirely irrelevant. I realize it's not a criminal trial.

The Court: What do you object to?

Mr. Bennett: He's talking about irrelevant matter. He's not talking about anything that this defendant did.

The Court: What's the purpose of this, Mr. Hayes?

Mr. Hayes: Well, the purpose of it is really to show that this fellow was in a prison escape and acted as a normal, sane, intelligent person would do. This is just a normal act of a person who wants to escape. You have to have intelligence and plan and scheme to do this.

Mr. Bennett: May it please the Court, he hasn't even [H 83] shown that this defendant participated in that. Of course, I'm going to bring this out on cross examination.

He hasn't shown to my knowledge any direct participation of this man in what was going on or any preplanning. I think he ought to confine himself to what this man did or what he said.

Q. (By Mr. Hayes) I asked about this defendant Coker—his participation in the escape.

A. He along with three escaped. His participation, I'm not sure of how he participated, but he did escape with two fellow inmates.

Q. And he went through the process you just told? Is that right?

A. Yes, sir.

Q. And how did he get out of the fence?

A. The area that they escaped from it outside the fence. They had access to the top of the building, and they came to the front of the building, which is out of the enclosure, and jumped from the roof of the building out onto the free world without any fence there.

Q. At that time did you try to catch them?

A. Yes, sir.

Q. What about this defendant—how did you go about trying to catch him on this occasion?

A. Well, they left the building by foot and they were tracked by tracking dogs to an area close to the Sinclair road or the drive-in theater area there on U.S. 1 near the railroad area, and the dogs seemed to lose the track there near the railroad, and we felt maybe that they had boarded a local freight train that had come through during that time.

Mr. Bennett: Now, your Honor, I object to that.

[H 84] The Court: That doesn't have anything to do with the issue now.

Q. (By Mr. Hayes) Just let me ask you this: Were his activities normal or abnormal to you?

Mr. Bennett: Objection.

The Court: Sustained.

Q. (By Mr. Hayes) Let me rephrase it: How did he act?

A. Well, I haven't talked with him. I haven't seen him but one occasion since the escape, and I didn't see him for several days after the escape.

Q. While he was in prison how did he act?

A. As normal as any other inmate.

MR. BENNETT: We object and move to exclude it.

THE COURT: He's comparing it with other inmates, and I'll let the jury draw the conclusion from that.

MR. HAYES: He's with you.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Warden Brown, did Mr. Coker make any requests to be examined mentally while he was under your charge?

A. No, sir.

Q. Were you aware of any requests in his file?

A. No, sir.

Q. You did have control of his file?

A. Yes, sir.

Q. As a matter of fact, you've got his file right here in the court room?

A. Yes, sir.

Q. And contained in that file is a very lengthy psychiatric evaluation?

A. Yes, sir.

[H 85] Q. That was done by Doctor who?

A. Dr. Casey, I understand.

Q. He was at Jackson, wasn't he?

A. I've never met Dr. Casey.

Q. What I mean is this is an evaluation done there?

A. Yes. During the diagnostic process.

Q. Is this done on all prisoners?

A. Yes, sir.

Q. That thorough an examination?

A. No, I wouldn't say that thorough. I don't know how to gauge that, but it's left up to the diagnosticians at Jackson to decide which inmates feel need this type of evaluation.

Q. So, this was an unusually thorough examination in this case, wasn't it?

A. I'm not qualified to say.

Q. I mean based on other examinations that you've seen.

A. Well, I wouldn't have psychiatric evaluations.

Q. I understand, but of those that do have them, would you say this one was more thorough?

A. This would be comparable to any of them, I would think.

Q. About like most of them?

A. I would think so.

Q. Now, you testified that that it would be your opinion that an escape like this would take some preplanning?

A. Yes, sir.

Q. You're not testifying that you know of any preplanning done by Ehrlich Coker, are you?

A. No, sir.

Q. And I think you very candidly and honestly stated that you don't know what his participation in the escape was, do you?

[H 86] A. Only that he escaped.

Q. You only know that he left?

A. That's all.

Q. And, for all you know, he could have been pulled along, or it could have been a spur of the moment decision?

A. I have no idea.

Q. I mean that would be just as consistent——

THE COURT: He says he doesn't have any idea.

Q. (BY MR. BENNETT) Were you present at that time when the escape was effected?

A. Yes, sir.

Q. Were you physically there watching?

A. No, sir. I was in my office at the time, apparently. Now, I couldn't swear to this. I was in the office when the officer notified me that they were having problems in the chapel area.

Q. You were attending to your normal duties, though, weren't you?

A. Yes, sir.

Q. And not in the immediate presence of the escape?

A. No, sir.

MR. BENNETT: I believe that's all.

(Witness excused)

MELVIN L. BENNETT was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Will you state your name for the record, please?

A. Melvin L. Bennett.

Q. By whom are you employed, Mr. Bennett?

A. Department of Corrections, Ware Correctional Institution, Ware [H 87] County, State of Georgia.

Q. Do you have any special training anywhere, Mr. Bennett?

A. Yes, sir.

Q. What do you do out there?

A. I'm a medical technician.

Q. Do you know this defendant Coker over there?

A. Yes, sir; I do.

Q. How long have you been knowing him?

A. How many months he was out there. I don't know how many months he was there.

Q. Did you see him on many occasions?

A. I've seen him several times, yes, sir.

Q. Has he ever complained to you about any insanity deal or anything?

A. No, sir. Just common colds.

Q. Just colds?

A. Yes, sir.

Q. You would be the person they would go to if they thought there was something wrong? Is that right?

A. Yes, sir.

Q. Have you talked to him on many occasions?

A. No, sir; except in his treatment for colds.

Q. But, when you'd talk to him, how did his actions and reactions compare with the other inmates out there?

A. They seemed to be on a normal basis with the other inmates.

MR. HAYES: You may cross examination.

CROSS EXAMINATION

Q. (BY MR. BENNETT) When you talked to him and when you saw him on sick calls, this was before his escape?

A. Yes, sir.

Q. In other words, you haven't talked to him since then?

A. No.

[H 88] MR. BENNETT: Come down.

(Witness excused)

THE COURT: Call your next witness.

MR. HAYES: The State rests.

MR. BENNETT: The defendant closes.

(The evidence was closed and argument of counsel to the jury followed.)

[H 89] CHARGE OF THE COURT.

THE COURT: Ladies and gentlemen of the jury, this is a matter that has come to you on a special plea of insanity that has been filed by Ehrlich Anthony Coker, and when I say "Coker" I mean Ehrlich Anthony Coker. Now, the special plea of insanity reads as follows:

"Now comes the defendant, Ehrlich Coker, the above named, and through his attorney enters this his plea of insanity at the present time, and requests trial by a special jury as provided by Georgia Code Annotated, Section 27-1502."

And there is an amendment to the special plea, which reads as follows:

"The defendant also pleads that he is now insane and unable to conduct his own defense, and requests a special jury trial on said issue."

Now, ladies and gentlemen of the jury, you will have this special plea out with you. I caution you that it is not evidence in the case, but you may have it and read it in its entirety to see what are the full contentions of the defendant in this case, Ehrlich Coker.

Now, I charge you, ladies and gentlemen, that under this plea the question of the mental condition, that is, whether Coker is mentally competent or incompetent is the question and the sole issue that you are empaneled to try and determine.

Now, you are made by law the exclusive judges as to the credibility of the witnesses that have testified in this case. In passing upon their credibility you may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their interest, or want of interest, in the case, their bias or prejudice if any exists, their means and opportunity for knowing the facts to which they testify, and the [H 90] probability or improbability of the testimony, and of the occurrences to which they testify, and also their personal credibility so far as the same legitimately appears upon the trial of this case.

Now, if, upon consideration of the evidence in this case, you find there is a conflict in the testimony between the witnesses, or a conflict between a witness or witnesses, and that includes the testimony of the defendant and the documentary evidence, then it is your duty to reconcile that conflict, if you

can, without imputing perjury to any witness, and if you cannot do that, then it becomes your duty to believe the witness or those witnesses you think best entitled to belief, and you may consider their interest or want of interest in the result of the case, their bias or prejudice if any appears, the reasonableness or unreasonableness of the statements they make, their familiarity with the facts they testify about, and the personal credibility of the witnesses so far as the same may legitimately appear upon the trial of the case, but the jury, as stated, are at last the sole and exclusive judges of what witness or witnesses they will believe or disbelieve and what testimony you will credit or discredit.

Now, evidence is all the testimony received from the witnesses and the defendant, the exhibits admitted during the trial, and any facts agreed to by counsel.

Evidence may be either direct or circumstantial or both.

Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence, if any.

Now, evidence may also be used to prove a fact by inference. This is referred to as circumstantial evidence.

Circumstantial evidence is the proof of facts or circum- [H 91] stances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience.

Now, I charge you that the burden rests upon the moving party, that is, Coker, the defendant, to satisfy the jury of the truth of his case by a preponderance of the evidence.

By a preponderance of the evidence is meant that superior weight of evidence upon the issue involved which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other.

In determining where the preponderance of the evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their interest or want of interest, their bias or prejudice, if any appears, their means and opportunity for knowing the facts to which they testify, and their personal credibility so far as the same may appear upon this case. The jury may also consider the number of witnesses, though the preponderance is not necessarily with the greater number.

Now, where in the opinion of the jury the evidence is equally balanced upon each side, where the jury believe the witnesses on each side equally credible, where the jury believe the evidence is as strong on one side as the other, then a preponderance of the evidence would not be carried, and in such case it would be the duty of the jury to return a verdict in favor of the State in this case.

I charge you that the burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential. [H 92] I further charge you, ladies and gentlemen, that whenever a plea of insanity is filed it shall be the duty of the Court to call the issue on the plea to be first tried by a special jury, and if found to be true the Court shall order the defendant to be delivered to the Superintendent of the Milledgeville State Hospital, there to remain until discharged in the manner prescribed by law. Of course, the name of the Milledgeville State Hospital has now been changed to Central State Hospital.

I charge you further that no lunatic or person afflicted with insanity shall be tried or put upon his trial for any offense during the time he is afflicted with such lunacy or insanity, but shall be tried in the manner heretofore pointed out when a plea of insanity at the time of the trial is filed, and on being found true the prisoner shall be disposed of in the manner stated. That is, a person who is insane is not capable of committing a crime, and the issue here you are to determine is whether or not Coker is now insane or mentally incompetent, or whether he is now sane. Now, the issue, actually, here is whether the defendant is mentally competent at the time of the trial, now, of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceeding, and is capable of rendering his attorney or attorneys such an assistance as proper defense to the indictment preferred against demands.

The issue that you are to determine is whether or not this defendant Coker is mentally competent now to understand the nature and object of the criminal proceedings, that is, the criminal charge that has been made against him as set out in the indictment, and whether or not he comprehends his own condition in reference to such proceedings, and whether or not he is capable of rendering his attorney such

assistance as is [H 93] proper in order for him to prepare and present his defense to the charge for which he now stands indicted.

Now, members of the jury, I charge you that the question raised by the defendant's special plea of insanity in this trial is not whether the defendant can distinguish between right and wrong, but whether or not he is capable at this time and at the time of his trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings and is capable of rendering his attorney such assistance as a proper defense to this indictment preferred against him demands.

I further charge you that under Georgia law every person is presumed to be of sound mind and discretion, but the presumption may be rebutted.

If you decide that he is sane, then that would mean that he would be capable of rendering assistance to his attorneys and understand the meaning of the charge that has been placed against him.

On the other hand, if you find to the contrary, that he is at this time insane, he would not, of course, be competent under the law to be tried for the offenses for which he stands accused.

Now, it is your responsibility, ladies and gentlemen, to give this case careful and conscientious consideration, and if, after consdering all the facts, the evidence and circumstances in this case and the law as given you by the Court in charge, decide that Coker is incompetent, that is, to understand the meaning of the charge or the crime with which he has been charged, and is incapable of assisting counsel in his defense, and that he is mentally incompetent to do so, then, of course, in that instance you would find him to be incompetent.

Now, after considering all the facts, the evidence and [H 94] the circumstances in this case and the law as given you in charge, if you decide that Coker is competent to stand trial on the charges made against him in the indictment, then the form of your verdict would be, "We, the jury, find Coker (naming him) competent."

On the other hand, if, after considering all the facts, the evidence and circumstances in the case and the law as given you in charge, you decide that the defendant is not capable

of understanding the criminal charge that is against him in this indictment and not competent in aiding his counsel in preparing and presenting his defense, and that that is his condition at this time, then the form of your verdict would be, "We, the jury, find Coker (naming him) incompetent." That would mean, of course, not capable.

Now, whatever your verdict is, let it be written on the back of this pleading you will have out with you, dated and signed by one of your members as your foreman.

All right, Mr. Bailiff, take the jury out.

(The jury thereupon retired from the court room.)

THE COURT: All right.

MR. BENNETT: Your Honor, the defendant would like to except to the failure of the Court to charge our request to charge No. 3, which deals with the presumption of sanity as related to the law we read to the Court at the beginning of our argument; and we also would like to except to the charge of the Court that said that the burden put upon the defendant is that of producing a preponderance of the evidence in favor of our position. We cite again the case of Grace versus State which specifically held that ——

THE COURT: That wasn't even a special plea in that [H 95] case.

MR. BENNETT: Yes, sir; that was a special plea.

THE COURT: As I interpreted that case, that was a plea of a general issue of insanity.

MR. BENNETT: Well, we still feel as though it would be appropriate to a special plea such as this.

THE COURT: The burden in a special plea is on the party claiming they are insane by a preponderance of the evidence. On a general issue of insanity, of course, the State carries the burden beyond a reasonable doubt. That is my interpretation of the law, but your exceptions are noted.

Is there anything further?

MR. BENNETT: No, sir.

(After sometime the jury returned into court with a verdict finding the defendant, Ehrlich Anthony Coker, competent.)

(Case closed)

[Sanity Verdict]

JURY VERDICT

We the Jury find the defendant, Ehrlich Anthony Coker, competent. This 19th day of November, 1974.

C. D. Vinson
Foreman

FINAL JUDGMENT ON PLEA OF INSANITY

The above case was called for trial on November 18, 1974, during the November Term, 1974 of Ware Superior Court, the State announcing ready.

The defendant filed the following special plea:

"Now comes the defendant above named and amends his special plea of insanity previously filed by adding thereto the following sentence: Defendant also pleads that he is now insane and unable to conduct his own defense and request a special jury trial on said issues."

The State traversed and denied the allegations of said special plea, and it was agreed between the State and Counsel for defendant that this issue would be submitted to a special jury, which was selected as provided by law and after hearing the evidence, the jury to which said issue was submitted returned the following verdict:

"We the Jury find the defendant, Ehrlich Anthony Coker, Competent. This 19th day of November, 1974. C. D. Vinson, Foreman.

WHEREFORE, it is ordered, considered and adjudged that the defendant Ehrlich Anthony Coker is competent and sane and adjudgment is entered in favor of the State and against the defendant in his special plea of insanity and defendant is competent to stand trial on the charges pending against him in this Court.

And it is so ordered, this 19th day of November, 1974. Let this order be filed and entered upon the minutes of this Court.

Unreadable
JUDGE, WARE SUPERIOR COURT

FILED IN OFFICE THIS 2nd DAY OF December 1974.
Unreadable CLERK

November 19, 1974.

[T 1] * (During the qualification of the jury by Mr. Hayes the following objections were made:)

MR. HAYES: (Addressing all jurors) If anybody has a question in your own mind about whether or not you would have any opposition to capital punishment—

MR. BENNETT: (Interposing) If it please the Court, I object to any further question about capital punishment. He has asked that question twice, and he is doing it a third time, and it is needlessly repetitious. There is no need of him going into it again, and we object to him doing it the third time.

MR. HAYES: Your Honor, let me ask it this way: If there's any doubt in your mind about it, raise your hand.

MR. BENNETT: Your Honor, we made an objection.

THE COURT: Overruled.

MR. BENNETT: Your Honor, at this time may we have the record reflect that the objections that were made prior to this time are still insisted upon by us relative to this particular case.

THE COURT: Let the record so indicate.

(A jury was duly empaneled and sworn and opening statements were made by counsel to the jury. Whereupon, at 6:35 P. M., November 19, 1974, an adjournment was taken.)

[T 2] AFTER ADJOURNMENT

9 o'clock A. M., November 20, 1974.

THE COURT: Call your first witness.

GEORGE SHIVER was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

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* Pagt references to the trial transcript, paginated from 1 to 251, will be prefaced by "T".

DIRECT EXAMINATION

Q. (By Mr. Hayes) Would you state your name for the record, please?

A. George Shiver.

Q. By whom are you employed, Mr. Shiver?

A. State of Georgia—State Board of Correction.

Q. What position do you hold with the State Board of Correction?

A. Correction Officer II.

Q. Where are you presently employed?

A. Ware Correctional Institution which is about two miles north of town.

Q. What county is that in?

A. Ware County.

Q. What State is that in?

A. Georgia.

Q. How long have you been so employed, Mr. Shiver?

A. April 1st will be five years.

Q. Do you know the defendant in this case, Ehrlich Anthony Coker?

A. Yes, sir.

Q. Is he in the court room here?

A. Yes, sir.

Q. Would you point at him, please?

A. He's the one with the flowerdy [sic] shirt on sitting over here at this table.

Mr. Hayes: Let the record show that the witness is [T 3] pointing at the defendant.

Q. About how long have you known this defendant?

A. It would be hard to say. About six months. Ever since he's been at the institution.

Q. I bring you attention particularly to the 2nd day of September of this year out at the Ware Correctional Institution here in Ware County—were you on duty at that time?

A. Yes, sir; I sure was.

Q. Were you on duty somewhere in the vicinity of eight o'clock that evening?

A. Yes, sir.

Q. What was going on, if anything, in the chapel?

A. They were having a meeting of Alcohol Anonymous.

Q. They were having an AA meeting?

A. Yes, sir.

Q. And what is the procedure when they have an AA

meeting or have something in the chapel as they were having on this occasion?

A. If it's a local meeting all the inmates can go in and an officer is required to be in there with them at this time.

Q. And who was that officer?

A. That was me.

Q. That was you?

A. Yes.

Q. What time was this meeting?

A. It started about 7:30 and was supposed to last till 8:30.

Q. Now, let me ask you about this particular defendant in court—did he attend this meeting?

A. Yes, sir; he did.

Q. Tell us about how many people attended that AA meeting in the chapel.

A. About thirty-three.

[T 4] Q. Did anything unusual happen back on this occasion between 7:30 and 8:30 that night?

A. Yes, sir; there did.

Q. About what time did this occur?

A. About 8:10 P. M.

Q. Look over and tell the jury what you first observed. What first attracted your attention?

A. The inmates coming back in the door with a wrench.

Q. All right, what happened then?

A. He told us to be still and he wasn't going to hurt anybody—that this was an escape.

Q. Now—

Mr. Bennett: (Interposing) If it please the Court, we object to this as being a statement not shown to have been made in the presence of the defendant.

The Court: The objection will be sustained.

Mr. Hayes: Let me withdraw it and reask it.

Q. Was the defendant Coker over here present?

A. Yes, sir; he was.

Q. Was this statement made in his presence?

A. Yes, sir; it was.

Mr. Bennett: Now, if it please the Court, I think they have got to show that it was made close enough that he could hear it and that it was made in his actual presence.

The Court: Proceed with the foundation.

Q. (By Mr. Hayes) What sized room is the chapel there?

A. I estimate it to be about 18 by 24.

Q. And how is the lighting?

A. There's windows all on each side with metal cage over the windows and it's got electric lights in it.

Q. And how is the sound proofing in there?

A. You can hear a person talk pretty well.

[T 5] Q. What was the party's name who made that statement?

A. Brink.

Q. Where was the defendant at that time in relation to where Brink was?

A. He was to the left in the room about ten or twelve feet from Brink.

Q. So the defendant at that time was about ten or twelve feet from Brink who was making the statement? Is that true?

A. Yes, sir; that's correct.

Q. Was Brink talking loud or was he talking average or was he talking low?

A. He was talking loud enough where all the inmates and I could hear it.

MR. BENNETT: We object to that as being a conclusion on the part of the witness.

THE COURT: Objection overruled. Go ahead.

Q. (BY MR. HAYES) What did Brink say in the presence of the defendant here in this case?

MR. BENNETT: May we have our objection noted to that as improper foundation?

THE COURT: Go ahead.

Q. (BY MR. HAYES) Go ahead, Mr. Shiver.

A. He said, "Don't move. This is an escape. I don't want to hurt anybody."

Q. What happened then, particularly in reference to the defendant? Or what happened to you?

A. I asked inmate Brink to let me get the ones not involved behind me.

MR. BENNETT: Now, your Honor, we still object to this as being an out of court statement and not made in the presence of the defendant. Right now he's talking about what he said in a normal tone of voice, and he's still ten or twelve feet away, and I don't think there's a [T 6] proper

foundation for any showing that the defendant Coker could have heard what he said.

THE COURT: Overruled.

MR. HAYES: Would you mark this State's Exhibit No. 1, please?

(The metal bar referred to was thereupon marked for identification "S-1.")

Q. Mr. Shiver, a while ago you said that one of the parties had a weapon in his hand—will you describe what it was?

A. It's a bar with a wrench at the end of it about twenty-two to twenty-seven inches long. It's the one you have right there.

Q. Would you examine State's Exhibit No. 1, please, sir?

A. This is the wrench, that inmate Brink had.

Q. You say this is the wrench?

A. Yes, sir; that's it.

Q. So we can get it in the record, about how long is this wrench?

A. Twenty-two to twenty-seven inches.

Q. About how heavy is it?

A. It's about, I would say, five or six pounds.

Q. And about what size in diameter?

A. It's about half inch at one end to, I guess, three-quarters at the other end.

Q. And what is it made of?

A. Steel.

MR. BENNETT: Your Honor, we object to that as being a mere conjecture of the witness.

THE COURT: Overruled.

Q. (BY MR. HAYES) Mr. Shiver, you said that one of them had this State's Exhibit No. 1—how was he holding it?

MR. BENNETT: If it please the Court, at this time we will object to any further exhibiting of this iron bar, or whatever it is, and any further questioning about the bar unless it is shown that it is in some way connected with the case at hand, and [T 7] more specifically unless it is shown that it is connected with this defendant, and at this point there is no showing whatsoever except that some other inmate—

THE COURT: (Interposing) I will expect it to be connected up. Proceed.

Q. (BY MR. HAYES) Tell us what happened, Mr. Shiver.

A. Inmate Brink was holding it in his right hand and he said, "Don't move. This is an escape. I don't want to hurt you."

Q. What happened then, Mr. Shiver, to the defendant over there?

A. I asked inmate Brink to let everybody not involved to step to one side. This he did do.

Q. I beg pardon?

A. This he did do, and there were nine inmates left at this time, and I asked them again if they were not involved to get behind me, and at this time—

MR. BENNETT: (Interposing) If it please the Court, I'm sorry to keep objecting, but I think that in view of certain recent decisions that have been made in this court I think that this witness should be instructed to testify merely as to what happened, and not as to his conclusion, because as to whether or not all nine of them had anything to do with the defendant Brink is a matter that's been previously adjudicated in this court, and I think that if he's going to testify to it, I think he ought to testify to it in the light of what this court has already decided on the point of those other four inmates.

THE COURT: Overruled.

Q. (BY MR. HAYES) Just tell us exactly what happened. No conclusion or anything—what happened?

A. And everybody was asked if they were not involved to come behind me, and they wouldn't move behind me. I said, "I consider you all involved." And at this time four inmates [T 8] went behind the door there and three of them started tearing out through the ceiling.

Q. Now, what four inmates was that started tearing out through the ceiling?

A. Frank Smith, Holland, Coker, and Butler was holding a steel door between me and the chapel and the institution hallway.

Q. What in particular was the defendant doing on this occasion—Coker?

A. He was helping them. They had a door closed between me and them and had a small glass window and he was helping the other two tear out through the ceiling.

Q. And you say Coker along with the others was tearing out through the ceiling—what was up in the ceiling in the area they were tearing out?

A. There was a piece of plywood that they had to tear out through, and there was nothing in the ceiling. It's just like an attic in a house.

Q. And did Coker here along with the others actually tear through the roof?

A. Yes, sir. He went through the roof with them.

Q. When this defendant and the others got through the roof where did that lead to? When they got on the roof where were they then?

A. He was up on top of the chapel and he had to go to the end of it—either end of it—and tear out again to get out.

MR. BENNETT: Now, we object to anything he didn't see the defendant do. He just stated a conclusion of what he thinks he did. He's testifying as that he knows for a fact. We object. It's a conclusion and mere conjecture on his part.

THE COURT: All right, connect it up if you can, Mr. Hayes.

Q. (BY MR. HAYES) This you testify to, you were looking at it, weren't you?

[T 9] A. Yes, sir.

Q. Did you determine how they got out of this upstairs?

A. After it happened I did.

Q. Well, what did you find up there?

A. I found a hole tore in a vent in the eaves of the chapel.

Q. Were you able to apprehend this defendant at that time on the premises?

A. No, sir.

Q. Coker, this defendant, and how many others actually escaped at that time?

A. Three—Coker and two more.

Q. A total of three of them actually escaped?

A. Yes, sir.

Q. And on this escape, what did you do trying to catch them?

A. Well, the institution officers called in the Sheriff's Department and State Patrol and they put out a search and had bloodhounds out trying to find them.

THE COURT: Mr. Hayes, just a minute, now. Are you going to connect up that iron bar any way?

MR. HAYES: Your Honor, I thought I had already connected it up.

Q. Let me ask you this: Did one of the three prisoners

there together have this bar and use it in helping escape—all three of them that were there together?

A. No, sir; not one of the three that escaped.

MR. BENNETT: If it please the Court, based on that testimony I move to exclude that iron bar as evidence and any testimony pertaining thereto.

MR. HAYES: Let me ask another question.

THE COURT: Let him go on and I'll rule on it in just [T 10] a minute.

Q. (BY MR. HAYES) Was this used by anyone while these parties escaped?

A. Yes, sir.

MR. BENNETT: Objection. That calls for a mere conclusion on his part.

THE COURT: Overruled. Go ahead.

MR. HAYES: So, at this time we've connected it and we tender it in evidence.

THE COURT: The objection is good. I will rule it out.

MR. HAYES: If the Court would withhold a ruling at this time—

THE COURT: All right, I will withhold it provided it is connected up. If not, I will rule it out.

Q. (BY MR. HAYES) Mr. Shiver, let me ask you this: Was the bar (I'm talking about State's Exhibit No. 1) in the chapel prior to the escape?

A. Yes.

Q. And when the escape was over—you say it was used in the escape—was it still in the chapel?

A. No, sir.

Q. Do you know of your own personal knowledge where it went to?

A. It went out with the inmates that escaped, and after they escaped the hole that they had tore out and you could see the bar was used in this escape.

MR. BENNETT: Objection to that.

THE COURT: I sustain the objection to that.

Q. (BY MR. HAYES) I believe you said it did go out with the prisoners when they escaped?

A. Yes.

Q. Mr. Shiver, now, let me ask you this: Were you with the dogs when they were trying to track them down?

A. Yes, sir.

Q. Were you able to track them down?

[T 11] A. No, sir. I wasn't.

Q. Where did you next see the defendant Coker in this case after he escaped?

A. After he had been apprehended by Sheriff Strickland, on US 82 West.

Q. You saw him next after he had been apprehended by Sheriff Strickland?

A. Yes, sir.

Q. About how long was this after he escaped?

A. I believe it was five or six hours after he escaped.

Q. And that was where?

A. US 82 West.

Q. So, he escaped somewhere around ten minutes after eight? I believe that's what you said, isn't it?

A. No, sir; it was between 8:10 and 8:30 that he escaped.

Q. So, he escaped between 8:10 and 8:30 on this date, September 2?

A. Yes.

Q. And the next time you saw him following his escape was on US Highway 82 West? Is that right?

A. Yes.

Q. About how far was that from the prison camp? About how many miles?

A. I would estimate about fifteen miles.

Q. About fifteen miles?

A. Yes.

Q. And whose custody was he in when you first saw him?

A. Sheriff Strickland's.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Mr. Shiver, as I understand your testimony, you said that after the meeting was over—this AA meeting [T 12] was over—this inmate Brinks picked up this iron bar and said something to the effect that, "Everybody, don't move?" Is that correct?

A. No, sir; that's not correct.

Q. What did he say?

A. The meeting was not over. It was about 8:10. They were having a call for the inmates who had not signed their names to go up and sign their names. He got up and walked

back to the door and picked up a bar and said, "This is an escape. Don't move and you won't get hurt."

Q. So, the meeting was going to reconvene after this break and let them sign the roll?

A. Yes.

Q. And you said four inmates started tearing out the ceiling—four of them went behind the door and three of them started tearing out the ceiling? Is that correct?

A. Yes, sir.

Q. Now, I'd like for you to come down off the stand, if you would—I'd like for you to make a diagram here big enough, the area we're talking about, including where those inmates were. Get it big enough, now, so the jury can see it. Show the hallway that went off of that room.

(The witness draws a diagram.)

A. All right, there's a diagram of the chapel.

Q. All right, hold it up here where the jury can see. Is this big room what you call the chapel?

A. That's right.

Q. What is this?

A. This is the hallway.

Q. What is this?

A. This is the hallway and this is the front gate.

[T 13] Q. This is where a supervisor is on duty?

A. Right.

Q. Now, show me where you were in that chapel.

(The witness indicates)

Q. Now, where was the defendant Brinks in that chapel? Put a "B" there.

(The witness apparently writes on the diagram.)

Q. Now, put a "C" for where Coker was in the chapel. Was he in the chapel?

(The witness apparently writes on the diagram.)

Q. So, you put him somewhere behind you?

A. No, sir; he's not behind me. He's in front of me. This is the room facing this way. This is Coker and this is Brinks.

Q. You are facing back toward the door?

A. Right.

Q. And that's Coker?

A. Right.

Q. And that's Brinks at the door?

A. Right.

Q. Now, you said there were how many others?

A. Coker and Brinks—there were nine altogether. Now, do you want me to put initials for everyone?

Q. Yes. Is this at the time he said, "This is an escape?"

A. Yes. This is all about where they were all except for one.

Q. This is you right here?

A. Yes.

Q. And you are facing toward the door?

A. Right.

Q. Now, this is a "C" for Coker?

A. Right.

Q. Who is this "S"?

A. Smith.

[T 14] Q. Who is this?

A. Holland, and Butler.

Q. Who is this?

A. Brinks.

Q. And this?

A. Dixon.

Q. Now, what you're saying is that Brinks was standing back here at the door leading into the hall?

A. Right.

Q. He picked up the iron?

A. Right.

Q. What happened after he picked up the iron?

A. He reached down like this (demonstrating) and come back and said, "This is an escape. Don't move. I don't want to hurt you."

Q. What happened after that? What did these men do?

A. Some of them got up and moved with me.

Q. All right, what did those men do that you've got here?

A. They stayed right there, and some of these started moving out of the way.

Q. Started moving back into this direction?

A. Right.

Q. And what happened to the other men?

A. These?

Q. You said these stayed where they were?

A. Right. And the ones that were not involved started moving back this way.

Q. You've got Dixon and—

A. And Skidmore right here. They stayed right there. I was right here.

Q. I thought you said you were right here.

A. No. This is before the escape. I know where I was.

Q. I'm not crossing you up. I'm asking you where everybody was when he picked up that bar.

[T 15] A. I was right here.

Q. Why did you say you were right here?

A. Well, this is where I moved around here letting everybody behind me.

Q. When he picked up the bar then you moved to right here?

A. Right.

Q. Now, when he picked up the bar you said four men moved into the hall?

A. Right.

Q. Which four were they?

A. Coker, Butler, Holland and Smith.

Q. Coker and Butler, Holland and Smith?

A. Yes.

Q. All right, you said nine of them refused to cooperate with you? Didn't you?

A. Right.

MR. HAYES: Your Honor, we object to that.

THE COURT: I don't see where it's got anything to do with this case. What's the purpose of it?

MR. BENNETT: Well, they're bringing in these other people.

THE COURT: What people?

MR. BENNETT: He said there were nine people involved in this thing. I'm just trying to clear up exactly who was involved.

THE COURT: I don't think he's trying to say anybody was involved. He's stating what was there and what happened. That's all. We'll let the jury make a decision on that. Let's proceed now.

Q. (BY MR. BENNETT) All right, now, after you moved down into this area here into the middle of the room—I'll draw an arrow there—now, draw an arrow for me, if you

will, from [T 16] the defendants, or from the individuals, rather, who moved into the hall. Just draw an arrow into the hall as to about where they were standing in the hall. All right.

A. And this is where Coker—

Q. (Interposing) We'll have to come down. We've got it so fine we're going to have to go down where the jury can see it.

(The witness went down before the jury.)

A. Coker was here. Here's the hall. There's a door right here. They moved right here. They moved through this door here and shut the steel door. I was here. Brinks was here.

Q. All right, let's go back to the stand.

(The witness returned to the stand.)

Q. Brinks stayed in the room, did he?

A. Yes.

Q. Now, Mr. Shiver, this is an iron door immediately leading out of the chapel?

A. No, sir; it's a wooden door.

Q. And will you describe that door?

A. It's a regular wooden door with a glass.

Q. For the record, would you describe the size of the glass over the door and the height of the door?

A. It's about two foot wide, and I'd say it's six foot high.

Q. The door is two feet wide and six feet high?

A. Yes.

Q. Where does the glass window fall into the door?

A. It's about four foot from the bottom of the floor.

Q. Would you stand up and indicate to the jury about where it would come on you if you were going right up to the glass door?

A. If I walked right up to it it would be right there (indicating).

Q. Would you be looking right at it?

A. Yes, just like you would that glass door right there.

[T 17] Q. How tall are you?

A. Five foot, seven and a half.

Q. That glass door, then, is about five foot, seven, or something like that from the floor? No, it would be a little bit shorter because it comes right about even with your eyes.

A. Yes.

Q. Now, how wide is this wall?
A. The hallway?
Q. I mean the hallway.
A. It's approximately three or four feet wide.
Q. So, there's a space on either side of the door?
A. Right.
Q. Is the door centered into a hallway?
A. Yes, sir.
Q. I'm talking about the door leading out of the chapel.
A. Yes, sir.
Q. Now, moving to the door in the middle of the hall, what kind of a door is that?
A. That's a steel door.
Q. Is that a security door?
A. Yes, sir.
Q. And this is where the defendant Butler was standing—where the inmate Butler was standing?
A. Right.
Q. And he was keeping that door locked, or shut?
A. Shut.
Q. Was he standing close to the wall, or what?
A. He standing to the right with the door shut.
Q. To the right with the door shut?
A. Right where I've got his initial.
Q. Now, if you were standing in the middle of the room—and I [T 18] take it that you were.
A. Right.
Q. How could you see these men and what they were doing if they were standing beside the door up next to the edge of the h. ll?
A. I could see them.
Q. You could see their actual bodies?
A. Right.
Q. Could you see through the wall there? Is that what you're saying?
A. No. Through that glass.
Q. How wide is that glass door here?
A. I said two foot—about two foot and a half.
Q. It's about two foot wide?
A. The door is two foot, six, I believe it is.
Q. And you're saying that that glass door is two feet wide?
A. I said that little glass is about the same size as that glass right there.

Q. There's about how much door left on either side of the window?
A. Approximately a foot.
Q. And how much wall is there?
A. Six inches, or five.
Q. And you could only see through that window? The door was closed, wasn't it?
A. Except for the times that Brinks would open it.
Q. Except for that time the door was closed, wasn't it?
A. Right.
Q. You couldn't actually see what these men were doing there, could you?
A. Yes, sir; I could see them.
Q. Well, what did you see them doing?
[T 19] A. Right on the side there I'd see them bring boards down.
Q. Did you see boards fall down?
A. No, they would take them and throw them down. And you could hear them tearing them out.
Q. You heard boards ripping?
A. I heard them tearing the boards out.
Q. How many boards did you see the defendant Coker rip out?
A. I didn't see the defendant Coker rip out none.
Q. Well, I thought you were telling the jury that he was in there ripping out boards.
A. I did not say it.
Q. Didn't you tell them the first time around that four inmates went behind the door and three started tearing out the ceiling?
A. That's right.
Q. Coker helped tear out the ceiling?
A. That's right.
Q. And now you're telling them he didn't tear out the first board, or you didn't see him?
A. Well, how many boards do you want me to say he tore out? Do you want me to say he tore them all out?
Q. I want you to tell the jury what you saw.
A. I did. I said them three was tearing out the ceiling.
Q. How many boards did you see Ehrlich Coker tear out? That's a simple question. Your answer is none or ten or whatever.

MR. HAYES: Now he is badgering the witness.

THE COURT: Let the witness answer the question if he knows. If he doesn't know, just say so. Answer the question.

THE WITNESS: I saw him put one piece of wood down on the floor.

Q. (BY MR. BENNETT) One piece of wood?

A. Right.

[T 20] Q. All right, where was he when he threw that piece of wood?

A. He was standing right underneath the hole that they went out.

Q. Right underneath it?

A. Right. With his back facing this way.

Q. Where was he standing in relation to that small window? To the window of the door?

A. His back would be—if you will walk over there I'll show you where to stand and show the jury.

Q. All right.

A. Now face the jury. On the other side. Right there. Back up a little. Right there.

Q. All right, that puts me on the side right at the edge of the glass door? Is that right?

A. Right.

Q. And where were you standing?

A. Inside of the chapel.

Q. And you say you could see his face?

A. I did not say I could see his face. I saw his body and I could recognize his body.

Q. This is based on recognizing his body? That's all you say?

A. That's right. He was the only white one out there.

Q. I thought you said the defendant Brinks went out there—that inmate Brinks went out there.

A. He did, but he did not—at this time when they were turned out Brinks wasn't there.

Q. Coker was the only white one out there?

A. That's right.

Q. Now, moving on down to the third door here—what kind of door is that?

[T 21] A. That's a metal door.

Q. And who was stationed at that?

A. Nobody.

MR. BENNETT: Will you mark that as Defendant's Exhibit 1?

(The diagram referred to was thereupon marked for identification "D-1.")

Q. Mr. Shiver, is it your testimony that Coker went out immediately after this wrench was picked up?

A. No, sir.

Q. How long before he went out?

A. Approximately five minutes.

Q. Who went out first?

A. Butler.

Q. How long after Butler did the next one go out?

A. Shortly there was Holland and Smith.

Q. How long after this started was it before they got out? How many minutes elapsed, I mean?

A. Before the inmates went through the ceiling?

Q. Before Holland and Smith went out. Butler and then Holland and Smith?

A. Right. Oh, I'd say three to five minutes. They went out together.

Q. Butler went out first?

A. Yes.

Q. And then about three minutes later Holland and Smith went out together?

A. Yes.

Q. Now, how long after that was it before Coker went out?

A. Shortly after.

Q. How long is "shortly after"?

A. I don't know. I wasn't keeping watch.

[T 22] Q. But you can estimate.

A. I say two or three minutes. Maybe five.

Q. Two or three minutes?

A. Yes.

Q. Two to five minutes, you say?

A. Yes.

Q. Now, what did he do during that period of time he was standing there?

A. Just stood there.

Q. You mean in the chapel?

A. Yes.

Q. Did anybody come back in and say anything to him?

A. What you mean say anything?

Q. Did any of the other inmates—I mean Holland or Smith?

A. I don't know.

Q. Do you say they didn't or you just don't remember?
A. I don't remember.
Q. Now, so far as your testimony about their route, if any, how they got out, what they did afterwards, you're just testifying about conclusions you've come to after you went up there and studied what happened and traced their foot steps? Isn't that correct?
A. You mean after their escape?
Q. Right.
A. I don't know anything about their escape after they left the premises. All I know is the time they started and how they went through the ceiling.
Q. Once they went in that hole you didn't see them any more, did you?
A. No.
Q. You're not prepared to testify as to anything that happened [T 23] after any individuals went through that hole and disappeared into it?
A. No, sir.
Q. Now, did you at any time see the defendant Coker standing there holding this bar?
A. No, sir.
Q. I'm talking about this iron bar.
A. No, sir.
Q. Did you see the bar go out through the roof?
A. No, sir.
Q. So, you don't know what happened to it, do you?
A. No, sir.
Q. Mr. Shiver, when was the first time you reported that Coker had left?
A. As soon as inmate Brinks and I walked up to see the warden and the warden told inmate Brinks that all inmates go back—to lock them all back up and release the officers and bring Brinks up there and he'd talk to him, and I asked Warden Brown did he get the three that got out through the chapel, and he said, "How did they get out?" And I said, "Through the ceiling."
Q. Don't go into what Warden Brown said. He's going to testify. I'm asking you when did you report that the defendant Coker had gone through the roof?
A. I went up there and told Mr. Brown that three of them went through the ceiling.
Q. And you said you went up there with inmate Brinks?

A. Yes, sir.
Q. Was that the transaction where Brinks had already gone up there and asked—
A. (Interposing) Yes, sir.
Q. And then came back and you went with him and he was arguing for amnesty, or something like this?
[T 24] A. Yes.
Q. And they wanted you to go with him to verify this?
A. That's right.
Q. When you went up there with him this is the first time you had left the chapel after the affair had started?
A. Right.
Q. And at this time you went up and told the warden that —asked him, "Did you get the people went out?"
A. I asked him did he get the three that went out.
Q. Did he get the three that went out?
A. I said, "Did you get the ones went out through the ceiling."
Q. Did you get the one went out through the ceiling?
A. No. Wait a minute, now.
Q. All right, I'm not trying to cross you up.
A. Not much.

THE COURT: Let's don't make remarks like that.

Q. (BY MR. BENNETT) Tell the jury what you said.
A. I asked the warden did he get the ones that got out.
Q. The ones that got out?
A. Right.
Q. So, you didn't say, "Did you get the three that got out?" And you didn't say, "Did you get the one that got out?" But, "Did you get the ones?"
A. That's right.
Q. You didn't specify the number?
A. No.
Q. Did you call the defendant Coker by name?
A. No, sir.
Q. Did you call either of the other inmates by name?
A. No, sir.
Q. Did you tell the warden the names of those that got out?
[T 25] A. No, sir.
Q. All right, why?
A. Because I wasn't sure how many there was.

Q. I understood from your direct testimony that you knew for a fact about those three.

A. Yes, I knew.

Q. Well, why didn't you tell the warden at that time?

A. Because we have a system out there that you have to sign a correct count sheet, and I would not specify who or say who until I knew for sure.

Q. And you mean that correct count procedure would apply even in the event of what you considered as being an escape?

A. If I told him there was an escape and there was three out and I went back there and there were six out, then I would be in trouble.

Q. Well, if you had said there were three out and possibly more, you wouldn't have been in trouble, would you?

A. That's right.

THE COURT: All right, let's move on to something that's material. That's not.

Q. (BY MR. BENNETT) Well, at the time you made that statement to Warden Brown that somebody had gone through the hole—

MR. PRITCHARD: He's going over the same thing that's been stricken already.

THE COURT: Just a minute. You are entitled to a thorough and sifting cross examination, but we're not going to bog down here all day on a matter that is irrelevant and immaterial to any issue that's before this Court. So long as it is material and relevant and has a bearing on these charges I'm going to let you go on with it, but we're not going to [T 26] sit here and just bog down on detail and detail and detail that has nothing to do with this matter this Court is hearing now. With those instructions, proceed with the cross examination.

MR. BENNETT: One final question:

Q. Mr. Shiver, at the time you reported to Warden Brown did you know that anyone had actually, in fact, escaped?

A. Yes, sir; I knew it.

Q. You knew they had left the premises?

A. Yes, sir—I didn't know they had left the premises.

THE COURT: You've already answered that. Go on with something else.

Q. You just knew they had gone through the hole, didn't you?

A. Yes, sir.

THE COURT: Go on with something else.

Q. (BY MR. BENNETT) They could still be in the attic, couldn't they?

THE COURT: Go on to another question.

MR. BENNETT: That's all we have.

(Witness excused)

THE COURT: Let me tell you something—when I make a ruling I'm going to make it one time, and attorneys are going to abide by my ruling. Whether they agree with it or don't agree with it has nothing to do with it. When I make a ruling that's the law of the case. That's just the way it is. Now, you are attorneys and you know what the law is, and if you disagree with it there's a method the law provides, and once I make it you will abide by it immediately.

MR. BENNETT: Yes, sir.

[T 27] THE COURT: Or else I'm going to hold the next one in contempt of court that doesn't abide by this Court's ruling.

MR. BENNETT: May it please the Court, we apologize.

THE COURT: I'm not asking for any apology. That's just the rule of procedure.

MR. BENNETT: Yes, sir

THE COURT: Have a seat, sir.

BRUCE BROWN was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Will you state your name for the record, please?

A. Bruce Brown.

Q. By whom are you employed, Mr. Brown?

A. The State of Georgia Board of Corrections.

Q. In what capacity are you employed with the State of Georgia?

A. Warden.

Q. Are you employed in a local area?

A. Yes, sir.

Q. What is the name of the institution that you are employed in the local area?

A. Ware Correctional Institution, Waycross, Georgia.

Q. What county is that in?

A. Ware County.

Q. What State is that in?

A. State of Georgia.

Q. Where is the prison camp located here in Ware County?

A. It's approximately three miles west out of town on US 1.

Q. How long have you been Warden of the Ware Institution?

A. Since November 15, 1973.

Q. Do you know the defendant in this case, Ehrlich Anthony [T 28] Coker?

A. Yes, sir.

Q. How long have you been knowing him, Warden?

A. Since he came to this institution.

Q. Tell us when that was if you recall?

A. Approximately—I think it was January of this year.

Q. January, 1974?

A. Yes, sir. I'm not sure of that.

Q. How did it come about that he came to your institution that you're a warden in?

A. The Board of Corrections appoints or assigns these inmates to an institution according to their custody and their status, and the reason this young fellow came to us—

Q. (Interposing) Just tell us who assigned him.

A. The Board of Corrections.

Q. Was he in the lawful custody of the Georgia Board of Corrections at that time?

A. Yes, sir.

Q. Was that true from the time he got there until the time he escaped?

A. Yes, sir.

Q. Do you have a copy of his records with you?

A. Yes, sir; I do.

MR. BENNETT: If it please the Court, the defendant will stipulate at this time that he was in lawful custody of the Department of Corrections.

THE COURT: That is stipulated.

MR. BENNETT: We object to the introduction of any record at this time.

MR. HAYES: If he stipulates that we will proceed.

[T 29] Q. Warden, I bring your attention particularly back to the 2nd day of September at Ware Institution that you're a Warden of in Ware County, Georgia—did anything unusual happen on this night at that institution?

A. Yes, sir.

Q. Would you look over and tell the jury what that was?

A. We had an escape—three prisoners escaped.

Q. Who were the three prisoners that escaped?

A. Jefferson Holland, Frank Smith and Ehrlich Coker.

Q. I ask you particularly about the defendant Coker—is he in the court room?

A. He is.

Q. Would you point him out, please, sir?

A. Yes, sir (pointing).

Q. Is that the man who was in your custody?

A. Yes, sir.

Q. What is the practice at the chapel out there about meetings and so on? Do you have a practice where the inmates can use it?

A The only way the inmates can use it is under the supervision of a correctional officer.

Q. Where is the chapel located in reference to the prison?

A. It is on the west side connected directly to the main institution with a hallway.

Q. So, actually, the chapel is part of the prison itself, is it not?

A. Yes, sir.

Q. And, where would the fences be in relation to the building?

A. Well, the chapel area, along with the main institution, is enclosed by a cyclone fence.

Q. In relation to the chapel, how many doors lead out of the [T 30] chapel?

A. There's only one door out of the chapel.

Q. And where does it lead to?

A. It leads back to the main institution.

Q. So, the chapel is actually part of the prison itself, and the only way to get from the chapel back to the prison is only one way? Is that correct?

A. Yes, sir. Now, excuse me, there are two doors there

that go into offices off from the chapel, but they do not have access to the main institution. There are actually three doors in the chapel. The main door is the only way they can get back to the main institution either in or out of the chapel.

Q. Now, I bring your attention back to the night of September 2 this year out at the correctional institution—was there a meeting going on that night?

A. Yes, sir.

Q. In the chapel?

A. Yes, sir.

Q. What type meeting was that?

A. This is an Alcoholic Anonymous meeting where inmates with alcoholic problems can participate.

Q. If you know, what time was this meeting to start that night?

A. Approximately seven o'clock or seven-thirty. I'm not sure.

Q. Where were you this night, Warden? Were you on duty that night?

A. I'm on duty, actually, twenty-four hours a day. I was in my office at that time. It's unusual I was there, but I was in my office at that time.

Q. Where is your office located in relation to the chapel?

A. My office is in the front of the institution, approximately—well, it adjoins the chapel—well, it's parallel to the chapel, but it is outside of the main gate to the institution.

[T 31] Q. And when did you first know there was something wrong on this occasion, Warden?

A. I was informed by my gate officer in charge.

MR. BENNETT: We object to what he was informed by another person as being hearsay.

MR. HAYES: We think it explains conduct.

MR. BENNETT: He can state what he did, but we object to what he was informed.

THE COURT: Objection sustained.

Q. (BY MR. HAYES) You understand don't tell what was told you, but somebody did talk to you?

A. Yes, sir.

Q. Don't tell what he said, but who talked to you?

A. The gate officer.

Q. When the gate officer talked to you what did you do then, Warden?

A. I drew a weapon and went outside the institution out by the fence.

Q. What was the purpose of this?

A. In case of an escape I felt that they did come through the chapel and I would be in position to observe this because I only had three officers on duty.

Q. Well, tell the jury what you saw and did.

A. Well, I went outside the institution and I informed the officer on duty to call in the necessary people that we felt we had to have, which included the Deputy Warden, Mr. Harden, and the other officers, and I went outside the institution and was there approximately, ten minutes, I guess, when Mr. Harden, the Deputy Warden, relieved me, and I went back into the institution.

Q. What did you find?

[T 32] A. When I went back to the institution I was informed that a—

Q. (Interposing) You can't tell what somebody said. Did somebody talk to you?

A. Yes. I met with a spokesman at the main gate, an inmate by the name of Bennie Butler, a black inmate. He—

Q. (Interposing) You can't tell what he told you, now.

A. He was sent there to—well, it's difficult for me to tell.

Q. I realize that, but did he talk to you?

A. Yes, sir.

Q. After he talked to you just tell what you said and what you did.

MR. BENNETT: If it please the Court, we object to anything he said—this witness said—out of court and out of the presence of the defendant. I feel like that would still be hearsay and we object to it.

MR. HAYES: Your Honor, I believe I asked him to exclude what was said to him as that would be hearsay. I asked this witness to tell what he said and what he did.

THE COURT: He can tell what he did.

Q. (BY MR. HAYES) What did you do?

A. I informed the inmate to bring or send the spokesman of the group to the gate, which he did. Shortly thereafter inmate William Brinks came to the front gate. I advised him that—

MR. BENNETT: May it please the Court, we object to what he advised Brinks. This is an out of court statement

made not in the presence of the defendant and would be hearsay. All this was said outside the presence of the defendant and out of court, and it constitutes hearsay.

THE COURT: What's the purpose of this?

[T 33] MR. HAYES: We were just showing part of the escape. We contend in response that what somebody said to him, of course, is hearsay, but he has the right to explain. This is part of the escape, and he can say what he did and what he said. Not what somebody told him. That's hearsay, but what he said is not hearsay.

THE COURT: Go ahead and ask him and let's see what it is.

Q. (BY MR. HAYES) Warden, don't tell what somebody said to you, but you said somebody came and talked to you?

A. I met Brinks, yes, sir.

Q. What did you do following that?

A. I told inmate Brinks to release the officers where the officers could place the inmates participating in the—in the AA meeting back in their cells where the building could be secured and we could get a count.

MR. BENNETT: If it please the Court, this very statement that we're talking about—it is a statement that's made outside the presence of the defendant, and it's not offered to explain conduct. It's pure hearsay so far as this defendant is concerned, because he was not present at the time the statement was made, and no way to cross examine. It's an out of court statement, and it's squarely within the Georgia definition of hearsay.

THE COURT: Objection overruled. Go ahead.

Q. (BY MR. HAYES) Go ahead and tell what you did and what you said. Following that what did you do?

A. The officers were released. They came out and the inmates were placed back in their security cells, and this was the extent of it.

Q. Did you see this defendant Coker after that?

A. No, sir.

Q. Did you look for him?

[T 34] A. Yes. When the inmates were placed back in their cells we had a head count and the count was three short.

Q. And who were the three short ones?

A. Inmate Coker, inmate Holland and inmate Smith.

Q. When was the next time you saw this defendant Coker, if you recall?

A. It was several days later. I believe he had been arraigned and brought back to our institution.

Q. Did you examine the building yourself?

A. Yes, sir.

Q. Tell what, if anything, you found in the hall next the chapel?

A. After we had found there was an escape I went inside the building and observed—there was an escape hatch, or a fire hatch, in the hallway between the chapel and the main institution which was torn out and they had gained access to the wall or the ceiling area of the chapel and gone out there, or came out and they went on the roof top of the main institution, and we found where they had torn out the gable—the wood gable—in the chapel area and gained freedom of the building to the rooftop, and then they escaped from the rooftop of the building.

Q. Did you determine how they left the rooftop to complete their escape?

A. Yes, sir. When they gained access to the roof, when they get to the office area, which includes my office, it is outside of the compound. The fence does not enclose the office area, and when they gained access to the roof of the building and came up to the east side of the office area, they jumped from the building into the woods.

Q. Would you examine State's Exhibit No. 1, please, sir?

[T 35] A. Yes, sir.

Q. Have you seen that before?

A. Yes, sir.

Q. Did you see it back on September 2 of this year?

A. Yes, sir.

Q. About what time of the day or night did you see it?

A. Approximately—I guess it was in the neighborhood of 10:00 P. M. that night.

Q. About how long was that after the defendant Coker had escaped?

A. Approximately an hour and a half.

Q. And where did you see it?

A. At the east side of the building—the office area.

Q. Where was that in reference to his escape at the top of the building that you referred to?

A. Well, it was across the building. The chapel area is on

the west side and this is on the east side of the main institution of the main office area, on the ground just close to the building.

Q. Were you able to determine anything from this weapon there?

A. No. Not at that time.

Q. What did you do with it when you picked it up?

A. I carried it to the front gate.

Q. What did you do with it then?

A. It was identified as being seen inside the chapel by one of my correction officers.

MR. BENNETT: We object to that and move to exclude it as being hearsay.

THE COURT: The objection sustained. The jury will disregard that statement.

Q. (BY MR. HAYES) Just tell me what you did with it.

A. I placed it on table at the main gate.

[T 36] Q. And what happened to it after then? Who was it turned over to?

A. It was not turned over to anyone. I placed it inside an office inside my office where we keep lie equipment.

Q. Has it been in your possession and custody since that time?

A. Yes, sir.

Q. Is that in the same condition now as it was at the time you found it?

A. Yes, sir.

Q. Warden, let me ask you this: You testified a while ago that they jumped off of the building. Is that correct?

A. Yes, sir.

Q. When they jumped off of the building did they leave any sign where they hit the ground?

A. Yes, sir.

MR. BENNETT: We object. That's leading the witness. We move to exclude it.

THE COURT: Did they leave any signs? That calls for a yes or no answer and that's a leading question. Ask him what he found, if anything.

Q. (BY MR. HAYES) What, if anything, did you observe at this place?

A. Near the area where this iron tool was picked up there

were heel prints that indicated that they jumped from the roof of the building down to the ground there in the area where we found this wrench.

Q. Where was this wrench in relation to those footprints that you have reference to that came off of the building?

A. Very close to it.

Q. About how far?

A. Three or four feet.

[T 37] Q. Warden, let me ask you this: Do you use dogs in an escape of this type?

A. Yes, sir.

Q. Did you in this case?

A. Yes, sir.

Q. Did you use them in this area?

A. Yes, sir.

Q. Where?

A. We took them to the area where we observed the tracks or the heel imprint.

Q. Where was that in relation to this iron bar?

A. Within two or three feet.

Q. And what direction did they go after that? What direction did the dogs go?

A. They went east, and trailed across the ball field there toward the county dump area, in that direction, and trailed from there through a wooded swamp area to a little Sinclair road off of U. S. 1, and they trailed from there across U. S. 1 to the railroad, and then they lost the track there, apparently.

Q. What direction does this railroad track run?

A. It runs east and west, parallel to U. S. 1.

Q. And, where is this railroad track in relation to where the prison camp is?

A. It's approximately, I would guess, one mile.

Q. Let me ask you this so we can get it in the record: U. S. 1 comes into what street?

A. State Street.

Q. When you get into Waycross you're talking about State Street and U. S. 1 as being the same thing? Is that correct?

A. Yes, sir.

[T 38] MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. STRICKLAND) Warden Brown, during the time this thing was supposed to have taken place in the chapel area you were not present? Is that correct? In the chapel?

A. No, sir.

Q. You can't testify and tell the jury about any of the events that went on in the chapel?

A. No, sir.

Q. You didn't see an iron bar in the possession of anyone in the chapel?

A. No, sir.

Q. Now, you testified that you talked to several people—I want to get straight as to whom you talked to first. Will you tell me again whom you talked to first?

A. To Officer Sublett. He was the officer in charge of the main fate.

Q. He was the first one who informed you that maybe something out of the ordinary was going on?

A. Yes, sir.

Q. Was he specific in what he told you as to what was going on, or did he just say there was something apparently out of the ordinary?

A. Well, he told me he was having a disturbance.

Q. Do you know how he, in fact, got his knowledge of what was going on?

A. I know what he told me.

Q. We don't want what he told you. But this was prior to you talking to inmate Butler and inmate Brinks? Is that correct?

A. Yes, sir.

[T 39] Q. Now, the next person whom you talked to I believe you testified was inmate Butler? Is that correct, sir?

A. I talked to my deputy warden, I guess, next. He relieved me there at the fence. I talked to him.

Q. But you did talk to inmate Butler?

A. Yes, sir.

Q. And I believe you testified that you had told him you wanted to talk to the person who evidently was in charge?

A. Yes, sir.

Q. And subsequently an inmate by the name of Brinks came and talked to you?

A. Yes, sir.

Q. And you testified, I believe, on direct you said that if the officers were released then you would talk with him? Is that correct? And they would be put back in the dormitory?

A. Yes.

Q. Now, at this time you talked to inmate Brinks, was he alone?

A. Yes, sir.

Q. When inmate Brinks left you and went back and your officers were released, had they come out at that time?

A. Yes, sir.

Q. You saw them come out?

A. Yes, sir.

Q. Now, did you physically supervise the returning of these inmates in the chapel area to the dormitory?

A. No, sir.

Q. But your officers did, I assume?

A. Yes, sir. When my two officers came out, Officer Shiver and inmate Brinks attempted to come to the front gate there, and I advised, or told, Shiver—I said, "Put all the inmates back in the dormitories and lock them up. Let's [T 40] get a count and then I will discuss any grievance," or something to this effect.

Q. At this time, Warden Brown, did Officer Shiver give you any numbers of persons that had gone through this hole in the chapel area?

A. I'm not sure. It was at this time or after he had locked them up; but sometime during this time he informed me—he asked me the question—he said, "Did you get those that went on the roof?"

Q. But, you're not sure whether it was at this time or at a subsequent time?

A. No, sir.

Q. So, if Officer Shiver had testified that he accompanied inmate Brinks to you for a meeting, and testified that he told you "Did you get those that went through the hole?" he would be somewhat incorrect in that statement? Is that correct?

A. I wouldn't say he was incorrect, but I'm not sure at which time he told me this. It could have been when he brought them out, before he locked them up, but sometime during this he did tell me this.

Q. When you talked to Officer Sublett, I believe, you didn't

know anything about any inmates going through any fire hatch?

A. No, sir.

Q. Now, it's a fire hatch on the outside of the chapel door, I take it—there are two doors, one going into the chapel and another going out to the hallway?

A. Well, actually, there's four doors in a little corridor there—four doors in the hallway.

Q. Now, what kind of material covers the fire hatch?

A. Plywood. Board, wood, covering.

Q. Is it nailed down?

[T 41] A. Yes. It was nailed down.

Q. Would you describe in your own terms what you mean by a fire hatch?

A. Well, this is—I might be using the wrong term as a fire hatch—this is a little area approximately twenty-four inches square that is made for access to get into the ceiling should you have a fire or should you need to inspect for fire.

Q. If it's to inspect for a fire that's taking place, wouldn't it be improper to have it nailed up?

A. It might be improper, but for security purposes we nail things down like this.

Q. So, in other words, if somebody gained access to that attic they would have had to pry this up?

A. It takes tools to do this. A man can't do this just with his hands.

Q. But you didn't physically see it?

A. No, sir.

Q. Now, you didn't know who was missing from your institution until head count?

A. No, sir.

Q. And even after the head count was taken you didn't know whether this individual or either of the other two individuals had physically removed themselves from your institution?

A. I only knew that three had gone, and it took a roll count of the dormitories to get the three that were missing. I didn't know the three until we got this.

Q. I take it from your statement "gone," that means just from their particular cell? Is that correct, sir?

A. That's right.

Q. Now, subsequent to going back in the chapel area and

getting up in it and going across the rooftop, you determined someone had jumped off? Is that correct?

[T 42] A. Yes, sir.

Q. And you stated, I believe, on direct that there was no fencing around this particular area?

A. There's no fencing around the area that they gained access to the ground from the roof. There's no fencing around this area.

Q. If security is needed, and it is in that particular institution, why have a fire escape nailed down and no fence around where they could jump off?

A. Well, the chapel area is not built for maximum security. This is the reason we have the correction officer to monitor meetings. The chapel area is not built for security purposes, and any time inmates go in there they are under direct supervision of a correctional officer.

Q. Now, in the area you found the iron bar? Is that correct?

A. Yes, sir.

Q. You personally did this yourself?

A. Yes, sir.

Q. But you can't testify that that was the iron bar that supposedly was in the chapel?

A. No, sir.

Q. Now, how long did it take you walking around this area to find it? I believe you testified an hour and a half, or something like that?

A. It was found an hour and a half, probably, after the escape. In walking around to see if the escape had taken place we had the dogs on the track, and this is when I went up on the building.

Q. Were the dogs in pursuit prior to you finding this iron bar?

A. No, sir.

[T 34] THE COURT: Why are you keeping on this iron bar? What's the purpose of it? Explain it to me.

MR. STRICKLAND: I believe on direct testimony, your Honor, the iron bar was found at another place where a shoe or heel mark was supposed to have been found.

THE COURT: I believe one of the charges against the defendant in this case is escape.

MR. STRICKLAND: Yes, sir.

THE COURT: I presume this is why the iron bar is brought

up. Is it in relation to that particular charge? It has no bearing to any other charge, does it?

MR. STRICKLAND: No, sir. That's what we're trying to establish.

THE COURT: Well, a person commits escape when he, having been convicted of a felony or misdemeanor, or the violation of a municipal ordinance, intentionally escapes from lawful custody from any place of lawful confinement. It's admitted in this case by stipulation that the defendant was in lawful confinement. Now, why do you keep on with this iron bar so much?

MR. STRICKLAND: We're getting ready to leave it so far as I'm concerned. We just wanted to make sure the jury understands that the iron bar didn't leave this particular institution in the possession of this defendant.

THE COURT: Is there any contention by the State that it did?

MR. PRITCHARD: We contend that they left it here right outside the compound.

THE COURT: Is there any contention that it left the institution?

MR. HAYES: It just left the inside and got on the [T 44] outside. That's all.

THE COURT: I'm trying to see what is the materiality of this thing over and over about the iron bar.

MR. STRICKLAND: I understand, your Honor, but we're also trying to establish that this iron bar that the State has been parading in front of the jury is not connected with this defendant.

THE COURT: All right, let's proceed.

Q. (BY MR. STRICKLAND) When you found the heel marks, Warden, was any attempt to make any sort of comparison plaster casts?

A. No, sir.

Q. Would that be normal in a situation such as this?

A. No, sir—yes, it would be normal that we would not take a plaster cast.

Q. Based on no comparison of plaster casts or any other type of identification of the heel marks, you can't testify that the heel marks at that particular location were heel marks left by this defendant?

A. No, sir.

Q. Warden Brown, you said you're not sure about when

Officer Shiver told you about the events that happened in the chapel area—would it not be proper procedure on the part of the correctional officer to notify you and tell you exactly what he observed at the earliest possible moment?

A. This would be in his discretion as to when he would consider the earliest possible moment; and as far as me testifying when he came out the first time after he had secured the building he told me, I couldn't testify this.

Q. When he came out of the chapel area were you at the front gate?

A. Yes, sir.

[T 45] Q. He would have had to come all this distance to come by you? is that correct?

A. To come to me. Not by me.

THE COURT: Is that all for this witness?

MR. STRICKLAND: That's all.

(Witness excused)

THE COURT: Call your next witness.

MR. HAYES: Call Allen Carver.

MR. BENNETT: Your Honor, while we're waiting for the witness we'd like to move at this time to exclude this iron bar from the court room and any further consideration by the jury. It's being waved around in front of the jury.

THE COURT: I'm not going to exclude, but I will direct that it be put down out of the way. Lay it down beside the table, but I'm going to allow it to go into evidence.

MR. BENNETT: We object to it being admitted.

MR. HAYES: The proper foundation has been shown.

THE COURT: I will admit it.

(The iron bar was thereupon received in evidence.)

ALLEN DAVID CARVER was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Your name is what, Mr. Carver?

A. Allen David Carver.

Q. Allen David Carver?

A. Yes, sir.

Q. Allen, how old were you back on September 2nd this year?

[T 46] A. Sixteen.

Q. Sixteen years old?
A. Yes, sir.
Q. Do you work or go to school?
A. I was employed at Piggly Wiggly.
Q. Where were you living back on September 2 this year, Allen?
A. I was living at 415 State Street.
Q. At 415 State Street?
A. Yes, sir.
Q. Is that inside the City of Waycross?
A. It's just right outside.
Q. What County is that in?
A. Ware County.
Q. What State is that in?
A. Georgia.
Q. Allen, are you married?
A. Yes, sir.
Q. Were you married back on September 2?
A. Yes, sir.
Q. Who are you married to?
A. Elnita Thomas.
Q. Back on September 2 did you have any children?
A. Yes, sir.
Q. How many children did you have, Allen?
A. One.
Q. How old was this child back on September 2nd this year?
A. About three weeks.
Q. About three weeks old?
A. Yes, sir.
Q. Who was living in the house with you back on September 2, [T 47] Allen?
A. My wife, Elnita Carver, and my little boy, Charles Carver.
Q. Had your wife been somewhere other than your house just prior to that?
A. She just got out of the hospital.
Q. What hospital was she in?
A. The Homerville hospital.
Q. When did your wife get back home in relation to September 2 this year?
A. Well, that was her first day home. That certain day she was at the house by herself. She was in bed at her mother's after she had the baby.

Q. She had had the baby and left the hospital and was in bed at her mother's?
A. Yes, sir.?

MR. BENNETT: Your Honor, I don't see the relevance of what she was doing at her mother's. We object to any further testimony about it unless it's shown to be relevant to the case.

THE COURT: I will let you go on and see if you connect it up.

Q. (BY MR. HAYES) You say this is the first day she'd been at your house?
A. Yes, sir.
Q. Here in Ware County?
A. Yes, sir.
Q. Allen, what is your child's name?
A. His name is Charles Allen Carver.
Q. Back on this particular day, September 2nd, you said your wife had got back home, who all was at your house here in [T 48] Ware County, Georgia?
A. On the 2nd?
Q. Yes.
A. Me and wife, Elnita Carver, and my boy, Charles Carver
Q. I bring your attention to this night of September 2 here in Ware County—did anything unusual happen at your house?
A. Yes, sir.
Q. About what time of the night did it happen?
A. Around about 11:00 o'clock.
Q. At this point at about 11:00 o'clock, Allen, tell me where you were.
A. I was standing beside my wife side of the stove in the kitchen.
Q. All right, you were in the kitchen by your wife side of the stove—where was your three weeks old baby at this time?
A. He was in the bed room asleep.
Q. How many doors open to this kitchen?
A. There's only one door—back door and front door.
Q. You have a back door and front door going in the kitchen? Is that right?
A. Well, the living room and the kitchen was the same room.

Q. The living room and the kitchen were the same room?

A. Yes, sir.

Q. Tell me what you first noticed unusual, and where it came from Allen, on this occasion around 11:00 o'clock at your home.

A. Well, I was standing about three or four feet from the back door and all of a sudden my back door just come open. It was shut, but it come open, and this man come walking inside with a board in his hand and swung it up close to my —slung it up to me and said—pointed to the bed room and said, "Get in there."

Q. What did you say to him?

[T 49] A. I asked him—I said, "What did we do?" And he said, "Just get in there." And I looked at him and I seen the clothes he was wearing and I recognized that he was a prisoner and I thought he must have broke out, or something.

Q. Describe the prison clothes that he had on.

A. He had a pair of white slacks and a white shirt with blue stripes on it.

Q. All right, when you recognized those prison clothes he had on and he had this board, what happened then?

A. Well, I walked—my wife walked around to the bed room and I walked behind her, and he told me to lay down on my stomach, and I laid down on the bed and I lay on my back and he told me to lay on my stomach, and he told my wife to tie me up, if she had any hose and rope to tie me up with, and she said she did, and, so, she found a blouse and tied my hands up, and he went over there and pulled on it, and he said, "It ain't tight enough," and tightened it up and pulled on it again and he said, "It still ain't tight enough." He told her to pull on it again and she pulled on it, and he said, "It still ain't tight enough," and he got it—well, he walked over there and he tightened it up real tight and pulled on it, and then he told me—he asked for some clothes and I told him the only clothes I had was in the closet, and he said—so, he found a pair of pants and took the clothes he was wearing off now and put on my pants, and he told me to get in the bath room.

Q. Did he have you tied at that time when he said to get in the bath room?

A. Yes, sir.

Q. How did he have you tied, Allen?

A. Well, my hands were behind my back and my feet was tied up and I was laying on my stomach.

[T 50] Q. Let me ask you this while I'm thinking about it: Is the party who busted into your house and tied you up in the court room now?

A. Yes, sir.

Q. Will you point at him, please?

A. Setting at the end of this table.

MR. HAYES: Let the record show that he is pointing at the defendant.

Q. Let me ask you this: Did you ever see him prior to that time in your life to your knowledge?

A. I didn't understand you.

Q. Did you already know this defendant?

A. No, sir. I never seen him before.

Q. What happened then, Allen?

A. Well, he told me to get up and go to the bath room, and I told him—I said I couldn't.

Q. Talk loud so the jury can hear you. Why couldn't you, Allen?

A. Because I was tied up and I couldn't move my feet, and he had that board in his hand and he said I better get up and go to the bath room, so I rolled off the bed and crawled to the bath room, and he told me to get up on the side of the bath tub, and I couldn't do it, so he grabbed my arm and pulled me up, and I stood on the bath tub side, and he took my arms and pulled them up higher and tied them to the bath room shower.

Q. What position were they tied at this time, Allen?

A. Sir?

Q. Were your arms tied to your front or back at this time?

A. They was tied to the back.

Q. All right, he took your arms tied to your back and tied you to what?

[T 51] A. The curtain—the shower curtain.

Q. What happened then, Allen?

A. He took a belt—my belt—and he tied me up.

Q. What part of your body did he tie up with your belt?

A. He tied my hands—wrapped my belt around my hands and tied the belt to the rod.

Q. All right?

A. And he went out of the bath room and went to the bed room and asked my wife if she had any—if we smoked.

Q. Did you hear this?

A. Yes, sir.

Q. All right.

A. And he turned around to me and said, "Do you smoke?" I said, "Yes, sir"—I said, "Yes," and he said, "You got any cigarettes?" I said, "No." And he said, "Do you drink?" I said, "No." He said, "Do you have anything to drink—any water?" I said, "We have some milk," and I remembered that we just got through making some tea, and I said, "We have some tea in the refrigerator," and he told my wife to go get it, and she went to the door and he went behind her and he grabbed her arm and he said, "Cut off the lights and lock the door," and she couldn't see nothing.

Q. Talk loud so they can hear you.

A. Later he came back and he asked my wife if we had a gun, and she said no, and he come back to me and he said, "Do you have a gun in the house?" I says, "No," and he said, "That's funny, you being married and out here by yourself and you don't have a gun?" I said, "I'm not old enough to have a gun." And he laughed, and he took the baby and pushed the baby in the bath room with me and took —he had this board and he untied me and told me to get up under the sink, and he untied [T 52] me—well, he didn't untie me. He untied me from the shower curtain—shower rod—and tied me up under the sink.

Q. All right, explain when he untied you from the shower curtain how he tied you to the sink.

A. He untied me and he grabbed my arm, and I bent down and he pushed me up under the sink and took the belt and he tied it around my arms and tied me the pipe under the sink, and tied my feet to the bathroom bowl, and he said for me not to try anything funny, that he didn't want to have to hurt me, and he said he'd hurt me.

Q. He said he'd hurt you if you didn't do what?

A. If I tried anything—tried to get untied.

Q. All right?

A. And he asked me if my car had any gas in it, and I said, "Yes." I said it had a little gas in it. And he said would it get him far—pretty far, and I said it might, and he

asked me where the keys was and I told him where they was, and he said did I have any money, and I said, "Yes," and he said, "Where is it?" And I told him in my billfold on top of the dresser.

Q. How much money did you have, Allen?

A. A little over twenty dollars.

Q. All right?

A. And he took my billfold and started pulling somethings out, and he pulled some cards out and took my money and the billfold and the keys.

Q. How much money did he rob you of?

A. Exactly $20.30.

Q. Whose money was that?

A. Mine.

Q. What was the value of it?

A. $20.30.

[T 53] Q. All right?

A. And he said that he was going to stay here till that morning, and he told me he was going to take the car, so, he asked my wife did she know how to crank up the car, and she said, "Yes", and he asked her if we had any knife, and she said, "Yes", and he told her to go get one; so, he followed behind her and grabbed her arm and followed behind her, and when he come back he had a steak knife. He had it in his hand and he put it between one of the belt loops in his pants—my pants, and he told my wife to change clothes. She had a night gown on, and he told her to change clothes, that she was going to show him how to crank up the car and how to operate it, and she got some clothes and she asked him if she could go in the bath room and change clothes, and he laughed and said, "I've seen people naked before," and she put on her shorts and she put it on without taking her robe off, and she turned around facing the wall and took off her robe, and when she started to put on her top he walked up there to her and shut the bathroom door.

Q. When he shut the bath room door you could no longer see them, could you?

A. No, sir. And I heard her crying and begging. She was saying, "Please don't mess with me." And she asked him several times not to, and I hollered at him and I said, "Hey, you said you weren't going to mess with my wife," and he went in there and he gagged me.

Q. What did he gag you with?

A. A pair of underwear of my wife.

MR. HAYES: Just one minute. Mark this.

(The knife referred to was thereupon marked for identification "S-2" and an [T 54] envelope was marked for identification "S-3.")

Q. A few minutes ago you made reference to a knife. Now I show you State's Exhibit No. 2 at this time. Would you examine it, please?

A. Yes, sir.

Q. Have you seen that knife before?

A. Yes, sir.

Q. Describe that knife.

A. It's approximately about six or seven inches long and it's a steak knife.

Q. About how long is the steel blade itself?

A. Four inches.

Q. Now, let me ask you about State's Exhibit No. 3. You made reference to something. Would you examine that, please?

A. Yes, sir.

Q. Tell me if you recognize that and tell what it is.

A. It's my wife's.

Q. Now, a while ago on State's Exhibit No. 3 you had reference to being gagged.

A. He gagged me with this.

Q. Well, what is it, so we can get it in the record?

A. He gagged me with my wife's underwear.

Q. How did he go about gagging you with it?

A. He tied it around my head and he stuck it in my mouth, and I don't remember what else, but he got some kind of rope or something and tied it around my mouth so I couldn't spit it out no way.

Q. So, State's Exhibit No. 3 is what he used to gag you with?

A. Yes, sir.

Q. A while ago you referred to a knife—is that the knife you referred to there?

[T 55] A. Yes, sir; the knife he had on the side of him when he didn't have this board with him.

MR. HAYES: Mark this as a State's exhibit, please.

(The piece of wood referred to was thereupon marked for identification "S-4.")

Q. Now, I show you State's Exhibit No. 4. Will you examine that, please?

A. That's the board he had when he opened the door and jumped in the house. He kept that with him at the time that he didn't have the knife with him.

Q. How was he holding that when he came inside the house?

A. He had it—

Q. Will you illustrate with your hands so the jury can see it?

A. He had it like this (demonstrating), and when he was tying me up he laid it against the bathroom commode.

Q. I believe you told us a while ago, Allen, that you were sixteen years old? Is that right?

A. Yes, sir.

Q. Allen, now, a while ago we were at the point that you were telling the jury you were in the bath room and you had hollered or tried to holler and he gagged you with these underpants of your wife? Is that right?

A. Yes, sir.

Q. What about taking it up from there and go ahead and tell them what happened?

A. And after he gagged me he walked back out—walked back out and shut the door, and I heard her crying.

Q. You heard who crying?

A. I heard my wife crying and begging him, "Please don't mess with me," and I started trying to say something and I was making [T 56] a noise and he opened the door and he said, "You shut your mouth," he said, "before I hurt you," and he shut the door again, and I just set there tied up and heard her crying and begging him, and he said, "Am I hurting you?" And she didn't say nothing, and he said—he said, "Tell your husband I ain't hurting you." He said, "Tell him louder," and he said—she said, "No," and he said, "Tell him the words," and she said, "He's not hurting me, Allen," and after while after he got through raping her he walked back in there and he asked me—he told me he was going to take my wife with him. First he asked me how he could get to Atlanta.

Q. Let me ask you something at this time, Allen: Was your wife sick at that time?

A. Yes, sir; she just got out of the hospital. She was very weak, and I had to leave her with somebody when I went to work, and everything.

Q. State whether or not she was menstruating, if you know, at the time.

A. Yes, sir; she was.

Q. Following that what happened, Allen?

A. He asked me how would he get to Atlanta, and I couldn't say nothing—my mouth was gagged, and he pulled the gag out—pulled it out, and I told him I didn't know, and I looked at my wife and I said, "Do you?" And she said, "No." He said, "You must know something." He said, "How long have you been living here?" My wife said, "Most all my life, in Waycross." And he said, "You must know something about here." He said, "How would you go about to get there?" She said, "You have to go through Waresboro and through Millwood and that's all as far as I know." And he said he was going to stay there till morning, [T 57] and I told him that some of my folks would come by at two o'clock and pick me up, and he said well, he was going to leave me and that he was going to take my wife with him, and I told him—I said, "You said that you wasn't going to take my wife," and he says, "Well, I'll just drop—tie her up at Waresboro—drop her off and tie her up at Waresboro."

Q. Allen, let me ask you something: You say he asked you about your car?

A. Yes, sir.

Q. Where was your car at that time?

A. It was in the front yard.

Q. What kind of car did you have?

A. A '64 Chrysler.

Q. What color was it?

A. White.

Q. How many doors did it have?

A. Four.

Q. Whose car was it?

A. It was mine.

Q. And what was the value of the car at that time, Allen?

A. It got me back and to to work.

Q. Would a reasonable value be $600?

MR. BENNETT: We object to his leading the witness.

THE COURT: Don't lead the witness.

Q. (BY MR. HAYES) What would you say would be a reasonable value of the car at that time, Allen? Approximately how much?

A. Approximately three or four hundred dollars.

Q. Now, that was the car he was talking about? You only owned one car? Is that right?

A. Yes, sir.

[T 58] Q. What did the defendant ask you about the car or tell you about the car?

A. He asked me—I told him—I said that the car give me a little trouble, and he had to crank it up a certain way, and he looked at my wife and asked her did she know how and she said, "Yes," and he said, "Come out here and show me," and he left the room. He was following her.

Q. Now, where were you and the baby at this time?

A. We was—I was tied up and the baby was in the bath room with me.

Q. Now, what happened about the car, Allen?

A. He went outside and I didn't know what happened. They come back and he said he was going to take my wife with him.

Q. Now, look over and talk to the jury. He said what?

A. He said he was going to take his wife—my wife with him and he was going to drop her out—off at Waresboro, and before he started to leave he looked at me and he put his hand on the knife and he says—

Q. He did what, now, Allen?

A. He put his hand—he grabbed the knife with his hand and—

Q. Now, what knife are you talking about?

A. This one right here.

Q. Just show the jury what he did.

A. He grabbed the knife like this (demonstrating)—he took it like that and he said that if he would get pulled over or the police was following him in any way that he would kill—he would kill my wife. He said he didn't have nothing to lose—that he was in prison for the rest of his life, anyway, and he left and I couldn't get unloose, and several minutes later I noticed a razor, something that my wife shaved her legs with, was setting under the baby's bassinet, and I noticed it, and [T 59] I forced my legs from where he tied me up and took my legs and I grabbed—pulled it towards me and I worked my hands from behind my back

in front of me and I took the razor and I couldn't twist my hand where I could cut it off—cut the hose and belt off my hands, so I had to cut it off the tie, and I got up and I started to go to my—to Mr. Smith's house, and I didn't want to leave the baby there, so I tried to pick him up and carry him with me, and my hands was still tied together, so I just took him in the living room and laid him in a basket of clothes that was in the living room, and I ran over to Mr. Smith's house and knocked on the door and he said—

MR. BENNETT: (Interposing) I object to what he said.

Q. (MR. HAYES) Just tell what you said and what you did.

A. He opened the door and I said a prisoner had broke out from the prison and come to the house and broke in the house and took—stole my car and raped my wife and took her with him, and I asked him if he would call the sheriff's office.

MR. BENNETT: If it please the Court, we must object to this conversation with Mr. Smith that was made out of court and outside the presence of the defendant. We move to exclude everything that he's already said.

THE COURT: Overruled.

Q. (MR. HAYES) Go ahead and tell what you said and what you did.

A. He was calling and he asked me—

Q. (Interposing) You can't tell what the fellow said. Just tell what you said and what you did.

A. I looked over at his wife and I started crying and his daughter took a knife and cut the rope.

Q. At that time you were still tied with a rope on what part of your body?

[T 60] A. My hands.

Q. You got your feet loose where you could walk? Is that right?

A. Yes, sir. And he said—well—

Q. Who cut the rope loose on your hands?

A. His daughter.

A. All right?

A. And he went to change clothes, and I told him that I was going to the house for I left the baby there, and, so, I went to the house, and the police was already there and I

told them that he took my wife and he said he was going to go to Atlanta and he was going through Waresboro, and I went in there and I picked the baby up, and they asked me several questions, and I asked them if they would—that he threatened to kill her and that I was scared that he was going to kill her—that he had a knife with him, and he said that they was going to get him—for me not to worry; and I asked him if I could go to my mother's house, and they carried me and by baby to my mother's house, and I went over to her mother's house and told her, and one of her sisters called the sheriff's office and they said that they had found them and that she was going to the hospital, and I went to the hospital and I met her there.

Q. You're talking about your wife now?

A. Yes, sir.

Q. When you went to the hospital where was she?

A. She come out of the emergency room.

Q. Now, this knife that the defendant had at the time, when did you last see him with that knife in relation to the time he left?

A. When I last seen the knife he had it in his hand like this (demonstrating).

Q. Doing what with it?

[T 61] A. He had it close to my wife, saying that he would kill my wife if the police would pull him over.

Q. He said if the police pulled him over he would take that knife to your wife? Is that right?

A. Yes, sir.

Q. What about this board here? Did he take that with him or did he leave that?

A. I didn't know. I didn't see him take it with him. He didn't take it with him. It was there.

Q. Who picked it up from the house, if you know?

A. I don't recall the officer. It was one that was there at the house.

Q. Did you point it out to them?

A. I didn't see it until about five minutes later, and I looked and said that was the board that he come in the house with.

Q. Is that in the same condition now that it was then, Allen? The board? Without the tag?

A. Yes, sir.

Q. What about the knife, without the tag on it?

A. It's the same thing.
Q. What about the underwear there?
A. Yes, sir.

MR. HAYES: Would you mark this for the next exhibit, please?

(The bag referred to was thereupon marked for identification "S-5.")

Q. Now, I show you State's Exhibit No. 5. Would you look at it and tell me if you recognize it?
A. Yes, sir.
Q. Allen, would you tell me what it is?
[T 62] A. This is my wife's part of my wife's top that he tied my feet with.
Q. All right?
A. This is the towel that he tied my feet with, too.
Q. All right?
A. The bra of my wife that he tied my hands with.
Q. All right?
A. This is part of the hose of my wife that he tied my hands with, too.
Q. All right. Is that in the same condition it was after you got it cut off of you?
A. Yes, sir.
Q. The same condition now?
A. Yes, sir.
Q. Did you say he used a belt a while ago?
A. Yes, sir.

MR. HAYES: Mark this as the next exhibit, please.

(The bag referred to was thereupon marked for identification "S-6.")

Q. Would you look at State's Exhibit 6, please, sir?
A. Yes, sir.
Q. Do you recognize any of the articles there, Allen?
A. Yes, sir.
Q. Which ones?
A. I recognize that comb.
Q. Whose comb is it?
A. It's mine.
Q. All right, what else?
A. And I recognize the watch.
Q. Whose watch is it?

[T 63] A. I don't know whether it was his or not. I noticed it on his arm.
Q. All right, what else is in there?
A. I don't remember seeing him with this.
Q. You don't recognize that?
A. No, sir.
Q. What else? Is there anything else that you recognize? Do you have a billfold, Allen?
A. Yes, sir.

MR. BENNETT: Objection, It's leading.
THE COURT: Objection sustained.

Q. (BY MR. HAYES) What else did he take from you? Did he take any of your property other than the money you referred to, the $20.30, Allen?
A. He took my billfold, containing my driver's license and Social Security card, a bank card, and $20.30.
Q. Where is your billfold?
A. I have it.
Q. Where is your driver's license?
A. I have it.
Q. Where is your Social Security card?
A. I have it.
Q. When did you get it back, Allen?
A. A few days after. I come back and told them that I needed my driver's license, and they just give me my billfold.
Q. Who did you get it back from, Allen?
A. I don't know his name, but he was there at the house taking pictures.
Q. Do you think you would recognize him if you would see him?
A. Yes, sir.

[T 64] MR. HAYES: Send in Sergeant Harry Watts.
MR. BENNETT: Your Honor, may we approach the bench?
THE COURT: Yes.

(A conference took place between the Court and counsel off the record.)

MR. HAYES: Allen, come down from the stand.
(The witness was excused)

HARRY WATTS was thereupon called as a witness in behalf

of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hayes) State your name for the record.
A. Harry Watts.
Q. What position do you hold with Ware County?
A. Detective with the Sheriff's office.
Q. Do you know Allen Carver who was just in here?
A. Yes, sir; I do.
Q. Did you turn anything over to him after this robbery, and so forth?
A. Yes, sir; I did.
Q. What did you turn over to him?
A. We turned over a billfold containing two ten dollar bills, serial number on one A45768443A; serial number on the second one, G30535189A; also a Georgia Driver's license, No. 4269974; Social Security Card, No. 253028294.
Q. Whose name was on the Social Security Card?
A. Allen David Carver.
Q. What about the driver's license?
A. Same. Allen David Carver. . . .

[CROSS EXAMINATION]

[T 67] Q. Now, you said you had this in your custody—what day did you obtain custody of it?
A. On the morning of the 3rd of September.
Q. What time was that?
A. Probably around—I would say estimated time probably around three o'clock in the morning—3:15.
Q. Where were you when you obtained it?
A. In the Sheriff's office in Ware County.
Q. And who else was there with you?
A. Captain J. E. Murrhee.
Q. Well, who else?
A. There were several officers at the court house that morning, but I don't remember exactly who all they were. Probably twelve or fifteen officers. Whether they can say they saw me obtain this billfold and contents, I don't know whether they can or not.
Q. Who else was there besides you and the other officers? Was the defendant there?

A. Yes, he was.
Q. All right. Who did you get the property from?
A. I took it off of him.
Q. How did you get it from him?
A. I took it off of him.
Q. Took it off of him?
A. That's right.
Q. He didn't give it to you?
A. No, sir he did not.
[T 68] Q. You physically and forcibly removed it from him yourself?
A. That I did.
Q. How did you do that?
A. He was in the briefing room at the rear of the jail with the handcuffs on him when the officers brought him in—Sheriff Strickland and the other officers. I took him into the briefing room where he was advised of his rights; I placed him up against the lockers, patted him down, and everything was taken out of his pockets.
Q. You say you patted him down?
A. That's correct.
Q. You advised him of his rights?
A. That's correct.

. . . .

[T 71] Q. Well, you said that night—did you find something on him later in his possession?
A. No.

. . . .

[T 76] (Witness excused)

(Whereupon, at 12:04 o'clock, P. M., November 20, 1974. a recess was taken.)

AFTER RECESS

1:30 o'clock P. M., November 20, 1974.

[T 77] The Court: All right, who is the next witness?
Mr. Hayes: Call Sergeant Watts back to the stand.

Mark this as the next State's Exhibit, please. (The bag referred to was thereupon marked for identification State's Exhibit "S-8.")

Harry Watts was thereupon recalled as a witness in behalf of the State, and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hayes) Sergeant Watts, would you examine State's Exhibit No. 8, please, sir?

A. Yes, sir.

Q. Do you recognize that?

A. Yes, sir; I do.

Q. What is that?

A. This is a white shirt that I took off of Ehrlich Coker the morning at the jail that he was arrested and brought in.

Q. What else is there?

A. A pair of tan socks that I recovered from the bed room of the Carver home that was left by Ehrlich Coker.

Q. What else is there?

A. A pair of tennis shoes was also recovered in the bed room of the home of Mr. Carver that was left by Ehrlich Coker.

Q. Whose possession have those articles been in since that time?

A. In my possession.

Q. Are they in the same condition now they were at the time you found them?

A. Yes, sir; they are.

Mr. Hayes: You may cross examine.

CROSS EXAMINATION

Q. (By Mr. Bennett) You took the white shirt off of him?

[T 78] A. Yes, sir; I did.

Q. That's when he put on the jail clothes?

A. That's correct.

Q. What about the pants he had on?

A. The pants that he had on at that time went to the Crime Lab.

Q. Where are they now?

A. So far as I know Dr. Sullenger has them.

Q. You don't have them back?

A. No, sir; I do not.

Q. But you did take those off at the same time?

A. Yes, sir; I did.

Q. Now, the sox, you said you found those in the Carver bed room?

A. Yes, sir.

Q. I believe you told the jury that Mr. Coker left them there?

A. Mr. Carver told me—

Mr. Bennett: (Interposing) Don't tell what Mr. Carver told you.

Q. Did you tell the jury that Mr. Coker left them there?

A. Yes, sir; I did.

Q. Did you see him wearing them?

A. No, I did not.

Q. Did you see him wearing the tennis shoes?

A. No, sir; I didn't.

Q. All you can, in fact, tell this jury is that you found those tennis shoes in the Carver bed room?

A. That's correct.

Q. And that you found the sox in the Carver bed room?

A. That's correct.

Q. You don't know where they came from, do you?

A. No, sir; I don't.

Q. You don't know if they belonged to Mr. Coker or not, do you?

[T 79] A. No, sir; I do not.

Q. In other words, there may be other witnesses who can testify as to who they belong to? Is that right?

A. That's correct.

Q. But you can't of your own knowledge, can you?

A. I didn't see him with them, no.

Mr. Bennett: All right.

Mr. Hayes: Would your mark this for identification purpose, please?

(The billfold referred to was thereupon marked for identification "S-9.")

REDIRECT EXAMINATION

Q. (By Mr. Hayes) Would you look at State's Exhibit 9 and look at the articles in it there, please, sir? Just tell me if you've seen it before.

A. Yes, sir; I have.

Q. Would you tell us what this is, please, sir?

A. This is Georgia Motor Vehicle License and Social Security Card belonging to Allen David Carver.

Q. Have you seen them before?

A. Yes, sir; I have.
Q. When did you first see them?
A. The billfold, driver's license and Social Security card were taken out of Ehrlich Coker's pocket.
Q. Who did you turn them over to?
A. Who did I turn these over to?
Q. Yes.
A. Allen Carver.
Q. How do you know it's the same one you took out of there? The same driver's license and Social Security card?
A. I had the number of the driver license and also the number [T 80] of the Social Security card that was taken from him and the one that was turned over to Mr. Carver.
Q. Is that the same number and the same card?
A. Yes, sir; it is.

MR. HAYES: Cross examine.

RECROSS EXAMINATION

. . . .

[T 82] Q. But, you are absolutely positive that these shoes and these sox didn't come from your patting him down after he was captured?
A. I picked up the sox at the foot of the bed in the Carver bed room; I picked up a pair of trousers from the Carver bed room at the foot of the bed; I also picked up a shirt from the foot of the bed. I did not pick up the tennis shoes at the foot of the bed. That was a mistake—I did not.
Q. You did not?
A. I don't remember where I got those from, but I did —they came—it was part of his property.
Q. Did you issue him a receipt for those shoes?
A. No, sir; I did not.
Q. Well, if you can't remember where you picked them up, how can [T 83] you be sure they're his shoes?
A. The shoes—where is the bag they were in? May I see it?

(Counsel hands a bag to the witness.)

THE WITNESS: No, that's not it. This is not my writing on the bag, sir. These were turned over to me.

Q. These were turned over to you?
A. That's correct.

Q. Who were they turned over to you by?
A. It does not say.
Q. Well, I'm asking you. Do you remember?
A. I don't remember.
Q. Well, how did you come to get possession of them? Did somebody turn them over to you?
A. That's correct.
Q. And you don't know who?
A. That's right.
Q. Now, Officer Watts, if you were mistaken about the shoes, you could also be mistaken about the sox?
A. No, sir.
Q. You're absolutely sure about that?
A. That's correct.
Q. Now, you were sure about the shoes until I asked you to go back and think it out.
A. I explained that I was mistaken about the shoes.
Q. You were sure until you just found that out, weren't you?
A. Yes, sir.
Q. Well, if I hadn't gotten back up and asked you about it again, that would still have been your evidence, wouldn't it?
A. I have photographs of what was taken from the bedroom, sir.
Q. You mean you have them here with you today?
A. That's correct.
[T 84] Q. Have you looked at them before you came up here to testify?
A. No, sir; I did not.
Q. But you mean having them with you, yet you're still not sure where those shoes came from?
A. Like I said, I haven't looked at them.
Q. Well, let me ask you to think back over all those other evidence that you've identified and see if you can think of any mistaken identification of any of those.
A. No, sir; I cannot. I can tell you exactly what I recovered—every piece of evidence that I recovered.
Q. But you say you didn't recover those shoes?
A. Those shoes were turned over to me.
Q. But you didn't recover them?
A. That's right.

Q. They could be my tennis shoes for all you know? Isn't that true?

A. As far as I know.

Q. Officer Watts, did you, in fact, go to the Carver house?

A. Yes, sir; I did.

Q. What time did you go?

A. Around 1:15 in the morning or 1:20.

Q. All right, now, tell me exactly again what you took out of the Carver house.

A. One T shirt; one pair of trusers; one pair of sox.

Q. All right, a T shirt and pair of trousers—where are they?

A. The Crime Lab. has them.

Q. All right, the T shirt and trousers are at the Crime Lab.?

A. Yes, sir.

Q. All right, what else did you take?

A. Each of these articles were stamped with the number "71."

Q. The T shirt and the pair of trousers?

[T 85] A. That's correct.

Q. All right?

A. And items that were used to tie the victim's husband's hands and feet.

Q. What?

A. I have the articles here.

Q. You said you had a list of what those items were? I'm asking what the list says.

A. As far as having it itemized on the list each article that was used to tie his hands, I do not. I have a photograph of it.

Q. You have a photograph of it?

A. That's correct.

Q. Can I see the photograph?

A. Yes, you may.

MR. HAYES: Your Honor, we plan on bringing the Sergeant back. He will identify all that.

THE COURT: Are you through with this witness?

MR. BENNETT: Yes, sir.

(Witness excused)

ALLEN DAVID CARVER was thereupon recalled as a witness in behalf of the State, and testified as follows:

DIRECT EXAMINATION

(Continued)

Q. (BY MR. HAYES) Mr. Carver, I show you State's Exhibit No. 9. Would you examine it please? What is that, Mr. Carver?

A. It's my Social Security card and my driver's license and my bill fold.

Q. Is that the billfold and Social Security card and driver's license that you have referred to?

[T 86] A. Yes, sir.

Q. Does your driver's license have a number?

A. Yes, sir.

Q. Would you read the number, please?

A. 4269974.

Q. Does it have your photograph on it?

A. Yes, sir.

Q. What about your Social Security card—does that have your name on it?

A. Yes, sir.

Q. Does it have your number on it?

A. Yes, sir.

Q. Would you read the number so we can get it in the record?

A. 253-02-82-94.

Q. Back on September 2nd when the defendant was taking your money and billfold and stuff that you've already testifed to, where were the Social Security card and driver's license?

A. In my billfold.

Q. Was that taken also?

A. The Social Security card?

Q. Yes.

A. Yes, sir.

Q. What about your driver's license?

A. Yes, sir.

Q. And where did you next see it?

A. I come back to the office in a couple of days and told them I needed my driver's license.

Q. Is that the same one you got back from the officer, Sergeant Watts?

A. Yes, sir.

[T 87] Q. Has it been in your possession since that time?

A. Yes, sir.
Q. Is it in the same condition now it was then?
A. Yes, sir.
Q. What do you actually have there? A billfold?
A. A billfold and Social Security card and driver's license.
Q. Now, you referred to having some type credit card or something? Is that right?
A. I had a bank number.
Q. You had a bank number card?
A. Yes, sir.
Q. Do you still have that?
A. No, sir; I dropped it.
Q. What about—did the officers turn you over any money?
A. Yes, sir.
Q. What did he turn you over?
A. He turned me over two tens—$20.30.
Q. He turned you over what you've already testified to, cards, billfold and money?
A. Yes, sir.
Q. Do you still have the money?
A. No, sir.
Q. What you still do have is the billfold and driver's license and your Social Security card?
A. Yes, sir.
Q. Would you look at State's Exhibit No. 8 and see if you recognize all or any part of it.
A. I recognize this shirt. It belongs to me.
Q. What happened to that shirt on September 2nd? So we can get it in the record, what is that, Allen?
A. A shirt.
[T 88] Q. What color is it?,
A. White.
Q. The night in question when the defendant got some of your clothes did he get that shirt?
A. Yes, sir.
Q. What did he do with his prison clothes that he had on?
A. He left them setting where he took them off.
Q. And you say that's your white shirt?
A. Yes, sir.
Q. When you saw him leaving with your wife was he wearing this white shirt?
A. Yes, sir.

Q. When is the next time you saw that white shirt? Now?
A. Just now.
Q. Who, if anybody, did you turn this billfold and Social Security card and driver's license over to? During the lunch hour?
A. I turned them over to you.
Q. Were you afraid when you were being robbed and your wife was raped, and so on?
A. Yes, sir. I didn't think I would live, or my wife or my little baby.
Q. All this was done forcibly and against your will?
A. Yes, sir. I thought it would be best to do or either get killed, either one.
Q. So you thought you would have it to do or either he was going to kill you? Is that right?
A. Yes, sir.

MR. HAYES: You may cross examine.

[T 89] CROSS EXAMINATION

Q. (BY MR. BENNETT) Allen, do you mind if I call you "Allen"? Let me introduce myself. I'm Kontz Bennett, Jr., and I'm the attorney representing Mr. Coker. I think you've met Mr. Strickland before. Allen, did I understand you to tell the jury that at the time, September 2nd, this year, your baby was going on three weeks?
A. Yes, sir.
Q. And I understood that your wife had just returned home—your wife and baby had just returned home that night? Or that day?
A. That day.
Q. Was your wife doing all right so far as her recovery?
A. Well, she just go out of bed. All she'd done was cook a little bit.
Q. You all were back in the kitchen at that time engaged in preparing a meal, or something like this?
A. Yes, sir.
Q. Now, Allen, do you remember testifying in this case back on September 16th at what we call a commitment hearing?
A. Yes, sir.
Q. Do you remember, Mr. Summerall, the man that's here?

A. Yes, sir.

Q. Do you remember how old you said your baby was at that time?

A. No, sir.

Q. Well, I'm reading from page four of the transcript of the testimony that day—this was question by Mr. Pritchard: "On that date, Mr. Carver, who was living in the home with you?" "Answer: My wife, Elnita Carver, and my little baby." "Question: How old in your baby?" "Answer: He's going on the second month."

Now, which one is correct?

[T 90] A. My wife had just been in bed for almost two weeks—for two weeks, and she—I thought she was doing good enough that she could go home and I could go to work and leave her there by herself. I thought she could take care of her and the baby.

THE COURT: Will this witness give the date of the birth of this baby, if he can, please?

THE WITNESS: August 10th.

THE COURT: What year?

THE WITNESS: '74.

Q. (BY MR. BENNETT) The baby wasn't going on the second month at that time, was it?

A. No, sir.

Q. Well, you were just mistaken when you testified about that?

A. I was mistaken.

Q. I believe you said that Mr. Coker came in the house around 11:00 P. M. That would have been that night?

A. Yes.

Q. Tell the jury what's the first thing you saw when he came in.

A. When I first come in—I mean when he first come in the thing that was on my mind was him with this particular board in his hand, and I didn't think nothing about—I thought he could use it, and I recognized the board and a few seconds later I recognized the clothes he was wearing.

Q. All right, what did he say?

A. He pointed—he pointed at me with the board and pointed at the room and said, "Get in the bed room".

Q. Now, I thought I understood you to say when he came in he was holding the board in some menacing fashioin.

A. Yes. Well, he—

Q. Excuse me. Let me frame my question: Was he threatening you with the board or was he pointing at the room with the board?

[T 91] A. He was—he took the board and he held it in front of me and he was waving it about two or three feet away from my face.

Q. Just waving it about two or three feet from your face? Holding it out in front of you like that?

A. Yes, sir.

Q. I thought I understood you to say when he first came in that he was holding the board up like that (demonstrating).

A. That's when he first come in. When he asked me—when he told me to get in the bed room, that's when he waved it in front of my face.

Q. Was he at any time holding the board up like that (demonstrating)?

A. When he first come in.

Q. How long did he hold it up like that?

A. I don't know.

Q. All right, now, you say he told you to lay down on your stomach and told your wife to get you tied up in some of these items of clothing here that he used or your wife used to bind you up, first on the bed with your hands tied behind you? Is that correct?

A. Yes, sir.

Q. And then I think you said that later on he told you to go into the bath room?

A. Yes, sir.

Q. Were your hands still tied behind you at that time?

A. Yes, sir.

Q. Now, were your feet tied when you were lying on the bed?

A. Yes, sir.

Q. Were they tied tightly?

A. Well, I couldn't walk.

Q. How did you get in the bath room?

A. I crawled.

Q. That's when he tied you up to the shower curtain rod?

[T 92] A. Yes, sir.

Q. Did you at any time tell him the ropes were hurting your hands—that your hands were growing numb?

A. And he told me "it's better than being dead."
Q. Did he ever do anything about it?
A. No.
Q. He didn't change them?
A. No.
Q. He didn't take you down and tie you to the commode?
A. Yes.
Q. Didn't you tell Mr. Hayes he did that?
A. Yes.
Q. Didn't he tell you he tied you to the commode after you complained about hands going numb?
A. It was hurting my arms when my arms were over my head and they were behind my back.
Q. And you told him this, didn't you?
A. I said it hurt. And he told me it was better than being dead. I asked a few times when my hands were swelled up and just painfully hurting, I said, "My hands are hurting real bad," and he said—he looked and said, "Well, it's better than being dead."
Q. I understand that. You said that three times, but didn't he later come back and change that?
A. Yes. He tied it tighter.
Q. But he took you down from that awkward position with your hands behind you, didn't he, it was hurting you so bad?
A. Yes, sir.
Q. As a matter of fact, you would have been in a more precarious position had he left you tied up to that curtain rod than he [T 93] left you, in fact, wouldn't you?
A. I think both of them was hurting me so bad.
Q. I understand, but it would have been more difficult for you to escape from the second position, would it not?
A. If I had stayed up there I could have pulled the bar down very easily.
Q. You could have pulled the bar down?
A. I could have jumped from where I was standing and pulled the bar down.
Q. Wouldn't that have wrenched your shoulder?
A. I don't think it would have went up any farther.
Q. Well, he did come back and change the knots and take you down from that shower curtain bar and put you down on the floor?
A. Yes, sir.

Q. Did he put anything under your head while you were held in that position?
A. Before he left?
Q. Yes. Like a pillow?
A. Yes.
Q. When did he do that?
A. Right before he left.
Q. Did he go out and then come back in and put the pillow under your head?
A. He—the pillow—well, he didn't go out, I don't think. He pust picked it up and threw it on the ground and told me I could lay on that.
Q. Where was the pillow when he picked it up?
A. I don't know.
Q. But he gave it to you?
A. Yes. sir.
[T 94] Q. Now, how did the little baby get to be in the bath room with you?
A. He pushed him in there.
Q. He pushed him in there?
A. Yes.
Q. As a matter of fact, didn't he put the baby in there?
A. Pushed the cradle he was in.
Q. The bassinet?
A. Yes, sir.
Q. The bassinet has rollers on it, doesn't it?
A. Yes, sir.
Q. And he rolled the bassinet into the bath room with you?
A. Yes, sir.
Q. And this is when he was getting ready to leave?
A. This was when he was getting ready.
Q. You assumed he was getting ready to leave?
A. No, this was—I had in mind he was going to leave at six o'clock, which he told me that he was going to leave when everything calmned down, and this was before he messed with my wife any way.
Q. Did you see the baby at that time?
A. I couldn't see the baby.
Q. But you could see the bassinet and you could see the bassinet was all right, couldn't you?
A. Yes, sir.
Q. Was the baby asleep?

A. Yes, sir.
Q. Was the baby asleep during the whole thing?
A. Yes, sir.
Q. Is the baby all right now?
A. Yes, sir.
[T 95] Q. Was the baby harmed in any way?
A. No, sir.
Q. Now, Allen, do you remember telling Mr. Pritchard at the commitment hearing describing that stick?
A. Yes, sir.
Q. Did he have the stick with him at the hearing? Did he show you the stick at that time?
A. I don't remember.
Q. We're talking about this (indicating), aren't we?
A. Yes.
Q. You don't remember?
A. No.
Q. Well, you would remember if you saw it on September 16th, wouldn't you?
A. I said I don't remember if he showed it to me or not.
Q. But this is what you were talking about?
A. Yes, sir.
Q. Now, did you tell the committing judge at that time on September 16th that it was a board?

Mr. Hayes: Now, your Honor, we object to him changing words. The proposition that it's a board or stick can be interchanged. It makes no difference.

The Court: Well, let's see what he's going to do about it.

Q. (By Mr. Bennett) Did you tell him how big it was?
A. I think I did.
Q. How big did you say it was?
A. I don't hardly remember that now.
Q. Well, I'm going to read the testimony there again on pages 10 and 11 of the commitment hearing and I'll ask you if this is the testimony you gave: Question by Mr. Pritchard: "And he had this board? Is that correct?" "Answer: Yes, sir." [T 96] "Question: Can you describe approximately how long it was?" "Answer: It was about three or four feet long." "Question: About how thick was it?" "Answer: About two inches thick and about three inches wide."

Is that board or stick, or whatever it is, two inches thick and three inches wide?

Mr. Hayes: Now, you Honor, he's read about one thing and he's asked him another question.

The Court: I will let him answer it.

Q. (By Mr. Bennett) Was this your testimony?
A. It sounds like it.
Q. Is this what we have here the description you gave the judge at that time?
A. That's the stick.
Q. That was your testimony at that time, wasn't it?
A. Yes.
Q. Now, I understood you to say you were standing right by your wife when she was cooking?
A. Yes, sir.
Q. I'm trying to get in my mind the actual chronology or sequence of events. After he told you to lay down on your stomach and told your wife to tie you up, is that when he started putting on your robes?
A. After he tied me up he asked me whether my clothes would fit him.
Q. After he tied you up then he asked you about your clothes? Is that right?
A. Yes, sir.
Q. Now, did you tell him where they were?
A. I told him there might be some in the closet.
Q. He didn't hit you or anything to get you to tell him where they [T 97] were, did he?
A. No. That the reason I told him.
Q. I beg pardon?
A. That's the reason I told him.
Q. So he wouldn't hit you?
A. Yes.
Q. Well, he didn't actually hit you, did he?
A. No.
Q. Did he say he was going to hit you?
A. Yes—he didn't tell me he was going to hit me if I didn't give him the clothes.
Q. He just said when he first came in, "Don't anybody try anything and nobody will ge hurt"? Is that what he said? He didn't threaten to kill you then, did he?
A. No, not at that time.
Q. Then, after he put on your clothes he took you into the

bath room, or, rather, he came back and said, "Get over there," and you had to crawl in and you were still tied up?

A. Yes, sir.

Q. Now, what did he have in his hand at that time?

A. That board.

Q. I thought you said he had already put on your clothes?

A. That's what he had in his hand.

Q. Well, did he put the board down while he was putting the clothes on?

A. I——

THE COURT: I don't know whether the witness understands what time you're asking him about.

MR. BENNETT: I'm talking about immediately after he put the clothes on.

[T 98] Q. Did he put the board or stick down while he was doing it?

A. I didn't know. He changed clothes and my face was facing the wall and I didn't know he'd changed clothes until I got up and I seen my clothes on him.

Q. You saw your clothes on him?

A. Yes.

Q. You knew at that time that he had taken his clothes off and put yours on?

A. Yes, sir.

Q. And you don't know if he put the stick down or anything like that, do you?

A. I don't know.

Q. When you turned around did he have the stick in his hand?

A. When he turned around?

Q. When you turned around and saw him when he was trying to get you to go in the bath room, and you turned around did he have that stick in his hand?

A. Yes.

Q. So, it is natural to assume that he'd gone and picked it up a second time?

MR HAYES: Your Honor, he never testified that he put it down.

Q. (BY MR. BENNETT) Do you know?

A. I don't know if he put it down or not.

Q. Now, what did he say to you about the board when he

told you to get in the bath room? He didn't have to tell you to do anything, really, except get in that bath room, did he?

A. He didn't say, "I'm telling you to get in there." He said, "Get in there."

Q. Did he say, "Get in there or I'm going to hurt you"?

A. He said, "Get in there." And I said, "I can't." And he [T 99] said louder, then—he said, "Get in there." And I managed to get in there by crawling.

Q. Now, you're sure that he was holding the board at that time?

A. Yes, sir.

Q. Did he draw the board back to hit you if you didn't get in there?

A. He had the board by me. He didn't have it like that, but he had it on the side.

Q. He was just holding the board?

A. He had it like that (demonstrating).

Q. Did he have it drawn back in cocked position?

A. Yes, sir.

Q. Allen, if your hands were tied behind you and your feet were tied how did you crawl?

A. I fell off the bed and while my front of my body hit, my knees pushed the rest of my body.

Q. Did Coker help you get in the bath room?

A. No.

Q. He didn't give you any help whatsoever?

A. No.

Q. Then, after he got you to the bath room he went back in the living room and he asked about the cigarettes, and she said she didn't smoke and you said that you did but you didn't have any, and asked if you drank and you said no, and is that when your wife went to get the tea for him?

A. After I told him that we had the tea.

Q. Was the baby already in the bath room with you at this time?

A. No, sir.

Q. Then after she brought him the tea he asked about a gun?

[T 100] A. Yes, sir.

Q. When he asked you about the gun where were you tied?

A. I was tied under the sink.

Q. You're sure about that?

A. No. I—when he asked me he asked me three or four different questions. I don't know how they exactly come in line or where I was—I remember—I think I was under the shower curtain then.

Q. Well, if you don't remember I'm sure you were scared? Right?

A. Yes.

Q. I don't expect mathematical certainty from somebody who was scared.

A. Good enough, that he asked me that.

Q. Now, I thought I understood you to say that after he had you tied with your hands on the sink and your feet around the commode, is that when he said, "Don't try anything funny. I don't want to hurt you"?

A. No.

Q. When did he say that?

A. When he started to messing with my wife and I told him that he said he wasn't going to do it, and he just said, "Shut your mouth." He said, "I don't want to have to hurt you."

Q. He didn't say he was going to hurt you, did he? He said he didn't want to hurt you? Is that right?

A. Yes.

Q. Now, when he started messing with your wife, as you put, where were you?

A. Under the sink.

Q. You're sure you were under the sink at that time?

A. Yes, sir.

Q. Now, where was the door of the bath room with respect to where you were?

A. It was right beside me.

Q. Could you look out the door or was it to your back?

A. The door—well, I was tied. My hands was tied behind me. I was tied to the sink that was behind me.

Q. What I'm asking you is could you look out the door? Were you facing the door or were you facing away from it?

A. I could till he shut the door.

Q. So, you could see outside until he shut the door?

A. Yes.

Q. What did you see out there? Did you see him out in the room?

A. No, he was—I couldn't see him.

Q. Could you see your wife?

A. Yes.

Q. You could see her very well? What was she doing?

A. I could see her good.

Q. But you could not see him because he was out of your range of vision, but you could see her?

A. Yes.

Q. What did you see her doing in the bed room?

A. Well, she asked if she could go in the bath room to change clothes, and he said that he'd seen naked people before.

Q. What did you see her doing?

A. Nothing at the time.

Q. She was just standing there?

A. She was standing there.

Q. And you saw her then turn her back to him?

A. Yes.

Q. Did you see her do that?

A. Yes.

Q. Now, did you actually see the sex act itself?

[T 102] A. No.

Q. You don't really know what he did, do you?

A. I didn't see nothing with my eyes.

Q. You didn't see him do anything to her, did you?

A. No, sir.

Q. All right, now, tell me exactly what you heard.

A. I heard—

Q. (Interposing) As I understand it, the door was closed at this time?

A. I seen him walking up to her, and he reached one hand and put on her and shut the door with the other hand.

Q. You say he reached up and touched her with one hand and shut the door with the other?

A. And I heard her crying, and she said—she said, "Please don't mess with me."

Q. Was she crying very loud?

A. Yes.

Q. Was she screaming?

A. No.

Q. Well, she was crying loud but not screaming?

A. Yes.

Q. All right?

A. And ahs [sic] asked him about four or five times and that's when I said he said he wasn't going to mess with my wife, and he said—he told me to shut up—he didn't want to

have to hurt me, and then he asked my wife—I heard him say, "Am I hurting you?"

Q. What did she say to that?

A. She didn't say nothing at that time, and I heard him say, "Am I hurting you?" He said it louder, and I heard her say—[T 103] she said, "Uh, huh" and he said, "Say it in words," and she said, "Allen, he's not hurting me." And I heard—I didn't hear—he didn't say no more that I heard, and I heard her crying a long time, and she'd say, "Please don't."

Q. Did she at any time yell or scream?

A. No. He had the knife on his side, in the belt there.

Q. He'd sent her to get the knife?

A. Yes.

Q. Did he go with her when she went to get the knife?

A. Yes.

Q. Did he follow her?

A. Yes.

Q. When is the first time you saw this knife?

A. I didn't see it until he was—when he was in the bed room when he was—he went through the drawers and everything and my wife was standing side the baby close to me, and I heard—I know she went in there to get the knife, but I didn't know he had it. I thought he had it in his hand, but I looked—I was looking at the pants he had on and he had no belt on and he had it through the loop—up under the loop.

Q. All right, what kind of pants did he have on?

A. A pair of blue jeans.

Q. Were they your blue jeans he had on?

A. Yes, sir.

Q. What you said is you saw him go into the kitchen to get the knife?

A. No, I didn't see him go in the kitchen.

Q. I thought understood you to say he went with your wife to get the knife. Did he go with her or not?

A. I don't know if he—when he told her to go get the knife, he grabbed her with both hands, I think, and they went past [T 104] where I couldn't see, and I don't know if he went farther on or not.

Q. The next thing you knew, though, he came back and he had that knife—was it just a regular belt looked like this?

A. Yes.

Q. Well, what was making it stay in the belt?

A. He had about an inch or two inches stuck in his front pocket of my pants.

Q. Now, when is the first time he pulled that knife out and held it in his hand?

A. That's when he started to leave and he threatened to kill my wife.

Q. I thought you said he had that knife beside him when they were in the bed room alone.

A. He had it on the side.

Q. You're not talking about having it laying on the table or in his hand?

A. I didn't see it.

Q. Now, when they were leaving pick up the knife and show me how he was holding it when he left with it and with your wife.

A. He stuck it about like that at my wife (demonstrating) and held it like that, and he pointed it at her and said—he said he was going to kill my wife if anybody pulled him over or the police was to follow him.

Q. And you were in the bath room and the baby was in there with you?

A. Yes.

Q. Now, where was she standing when he did that? Was she facing him or did she have her back to him, or what?

A. She was facing me and him.

Q. Do you remember testifying about this, Allen?

[T 105] A. No.

Q. You don't remember what you said? Did you tell the judge at that time that he never took it out of his belt?

A. I don't remember, hardly.

Q. I'm going to read your testimony from page 12 and ask you if it's true—pages 11 and 12, beginning at the bottom: "Did you ever see any other weapon—any weapon other than this board or stick you referred to in the defendant's hands?" "Answer: Yes, a steak knife." "Question: Will you describe this—how wide or how long it was?" "Answer: It was about four or five inches long and about an inch or a half an inch wide." "Question: When did you notice this in the defendant's hand?" "Answer: It wasn't in his hand. He had it in his belt at the times that I seen him with it."

Now, was that your testimony there?

A. I guess.

Q. Well, do you want to change your testimony about him

holding the knife at your wife, or do you want to admit that what you testified to earlier was incorrect?

A. I was nervous—I was very nervous, and I didn't think, I don't guess—I knew he had the knife. I don't know if I said that. I must have or it wouldn't be there, but I know that—I remember that he did take out that knife and say that.

Q. Allen, isn't it true that he just held his hand and shook it towards you and to his wife—to your wife and said, "If you do anything I'm going to hurt you," or "hurt her?"

A. No.

Q. And didn't you say that he just left with the knife in his belt?

A. No.

[T 106] Q. Isn't what you first testified to to the judge here, isn't that, in fact, what really happened?

MR. HAYES: Your Honor, he's already answered the question.

Q. (BY MR. BENNETT) Isn't that what you're saying—that what you testified earlier was incorrect?

A. Yes, sir.

MR. HAYES: Your Honor, he's explained that.

THE COURT: You all can argue that to the jury and let the jury decide that. Is that all for this witness?

MR. BENNETT: No, sir.

Q. Allen, let me ask you, where is the bank card?

A. I threw it away.

Q. Did you realize that it might be needed for evidence in this case?

A. Well, I thought we already had it in court and I didn't know we was going to go back and I didn't know it was ever going to be brought up again.

Q. Did anybody in the Sheriff's Department tell you not to get rid of it, that we might need it as evidence?

A. Yes.

Q. They did tell you that?

A. Yes.

Q. Who told you that?

A. The man gave me the billfold.

Q. The man who gave you the billfold?

A. Yes.

Q. Do you know his name or have you seen him today?

A. Yes, sir.

Q. Is he the one testified here before you?

[T 107] A. I don't know if he testified. I think it's Harry or Larry Watts.

Q. Allen, if you don't know the answer to any question I ask you just say that. Now, when Coker inquired about the money and any other items that he did at the time he was talking about the money, where was he standing?

A. I couldn't see but his shoulder and his hand. He had the billfold pointed out towards the bath room so he could see what he was looking at.

Q. He already had the bill fold?

A. Yes.

Q. How did he find it?

A. It was setting on top of the dresser.

Q. Well, how did he know to look on top of the dresser?

MR. HAYES: Now, your Honor, we object to that. He couldn't possibly know.

MR. BENNETT: Let me withdraw the question and ask another question:

Q. Did you tell him where the billfold was, Allen?

A. I don't remember. I think at one time I did.

Q. You think at one time you did?

A. Yes.

Q. Well, he didn't take the stick and come over there and brandish it at you and tell you he was going to bash your head in if you didn't tell him where the money was, did he?

A. No.

Q. As a matter of fact, you were more than glad to tell him where your money was if he'd just leave you alone? Isn't that correct?

A. Yes.

[T 108] Q. I believe you told the previous judge that you actually told him that while he didn't demand the money—let me read your testimony. I'm reading from page 13. Did you not testify in response to the question, "Did you make a suggestion that you had some money and he could take it if no harm came to the family, or did he demand the money?" "Answer: He didn't demand the money, but I didn't say that I had money. I said, yes, I did. I said 'You can take what money I got.'"

A. When I first walked in the bed room I was scared and

at first I thought all he wanted was just to take the car and leave and he was going to leave us there dead, so, I said, "Take my car, take my money. Just leave us alone." I said, "Don't mess with my wife and little boy."

Q. Is that when you offered him the money that you're talking about here?

A. I said if he would leave, yes.

Q. Well, the only thing I'm trying to establish is that he didn't actually force you to give him the money, did he?

MR. HAYES: Your Honor, we object to that kind of question.

MR. BENNETT: I withdraw it. I think the jury can draw their own conclusion.

Q. (BY MR. BENNETT) Allen, how far away were you from the bed room or from the bed when your wife and Coker were in there by themselves?

A. About four or five yards.

Q. And he closed the door between you?

A. Yes.

Q. When you talked about four or five yards, you're actually talking about eighteen feet, aren't you?

[T 109] A. I don't know exactly.

Q. Well, four or five yards?

A. Yes.

Q. If you say four yards you're talking about twelve or fifteen feet, aren't you? I mean, at least that?

A. Well, three or four yards.

Q. Well, let me ask you this, Allen—I know you're doing your best to tell the truth—are you absolutely sure you could hear what was going on in that bed room?

A. I heard my wife crying constantly.

Q. Did you hear him saying anything to her?

A. No.

Q. Did you hear him threaten her any way?

A. No.

Q. Did you hear him tell her to lie down on the bed?

A. I didn't hear nothing but my wife crying.

Q. You didn't hear anything but your wife?

A. No.

Q. Allen, was there a lot of traffic by your house at that time of night?

A. Yes.

Q. Very loud?

A. I didn't hear cars or traffic, but I heard sirens.

Q. While you were tied up?

A. Yes.

Q. You didn't hear any trucks or trains?

A. I think I heard one train. They come through pretty often.

Q. Any trucks or trains or cars come by your house while this alleged act was going on in the bed room?

A. I don't know.

Q. Did you hear any?

[T 110] A. I wasn't listening.

Q. I believe I understood you to say you couldn't see the knife when he was in the bed room? Is that correct?

A. When he had the door closed.

Q. I'm sorry, but I'll have to direct your attention back to the testimony given before the committing magistrate on Page 12, beginning at the top of the page when you were asked to describe the knife and you said it was about four or five inches long and about an inch or a half an inch wide, and the question: "When did you notice this in the defendant's hand?" "Answer: It wasn't in his hand. He had it in his belt at the times that I seen him with it." "Question: When was that?" "Answer: After I was tied up and he come inside—he come in the bath room and looked in the medicine cabinet." "Question: In other words, you never did see this so-called steak knife until after he had put you in the bath room? Is that right?" "Answer: Well, I seen it when he was in the bed room—well, I could see it, I think."

Now—

MR. HAYES: (Interposing) Now, just one minute. That's not the way he asked it. He asked him if he could see the knife after he closed the door. He read a different part of his testimony.

MR. BENNETT: No, sir; I haven't.

THE COURT: What is the testimony you were reading then?

MR. BENNETT: I'm reading the testimony of the commitment hearing.

THE COURT: Read it again and let me listen.

MR. BENNETT: I'll skip the first part. He said, "In other words, you never did see this so-called steak knife until after he had put you in the bath room? Is that right?"

"Answer: Well, I seen it when he was in the bed room—well, I [T 111] could see it, I think."

THE COURT: What's the question?

MR. BENNETT: Well, he's testified that he couldn't see the knife when he was in the bed room.

THE COURT: What is your question?

MR. BENNETT: I want to ask him which one of these is correct.

MR. HAYES: Your Honor, I object to that.

THE COURT: I'm going to let him ask it. Go ahead and ask it.

Q. BY MR. BENNETT: Did you ever see it in the bed room, and, if so, when?

A. I seen it before he messed with my wife—I seen him with it.

Q. And that was before he closed the door?

A. Yes. I seen it on the side of his pants.

Q. All right, you're sure you saw the knife? When you testified to Judge Allen you said, "I could see it, I think." Now, can you be sure at this time that you did, in fact, see the knife in the bed room?

A. Yes.

Q. Were the lights off in the bed room at that time?

A. Yes.

Q. And he was twelve to fifteen feet away?

A. I don't know how far.

MR. BENNETT: I believe that's all.

REDIRECT EXAMINATION

Q. (BY MR. HAYES) Mr. Carver, did I understand you correctly to say you could see through from where you were to the bed room until he closed the door?

A. The bath room light shined on him to where I could see him.

[T 112] Q. And, then, after he closed the door you couldn't see anything? Is that what you testified?

A. Yes, sir.

MR. HAYES: You can come down.

(Witness excused)

RAYMOND SMITH was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) State your name for the record.

A. My name is Raymond Smith, Route 1, Waycross.

Q. Mr. Smith, do you know Allen Carver, who was just on the witness stand?

A. Yes.

Q. Do you know where he lived back on September 2 this year?

A. Yes, sir, he rented a house from me on Route 1.

Q. How far was the house he rented from the house where you lived?

A. Approximately 400 feet.

Q. Now, I bring your attention, Mr. Smith, back to the night of September 2 of this year—did you see Allen Carver?

A. Well, shortly after midnight. I'd say around 1:10.

Q. Where were you, Mr. Smith?

A. I was in bed asleep.

Q Look over and tell the jury what happened.

A. Well, my door bell rang, so I got up to see what was going on. I heard somebody hollering, "Help!"

MR. BENNETT: We object to anything he heard somebody say or holler.

MR. HAYES: This would be part of the res gestae and we think it is admissible.

[T 113] THE COURT: Overruled.

Q. (BY MR. HAYES) Tell us what was said to you, Mr. Smith?

A. Well, I went to the door and I seen Allen standing there. He just said, "Open the door! Help!" So, I opened the door and he come in, and when he did I locked it, and he told me—he said a convict had been to his house, and had taken his wife; and I talked to him and his hands were tied.

Q. Will you indicate to the jury where they can see it?

A. When he come in the house his hands were together like this (demonstrating) with a belt around them, and the belt was hanging down; and he had some rags or something around his neck, looked like some kind of piece of cloth or

something. Anyhow, we got him untied, and I asked him did he want me to call the sheriff or did he want to call him, and he said, "You call him," so I called him and reported it. I'd say it was around 1:15 when I called the Sheriff's office. And my wife asked him where the baby was, and he said the baby was down at the house, and he said, "My goodness, I'll go down there"; something like that; and I told him to just wait and let me go back in there and get on my clothes and I'd go down there with him. Well, I went back in and got my clothes on and I come back, and as we were coming out of the door the deputies come up, so they went on back down to the house with him.

Q. You actually made the call to the law enforcement officers?

A. Yes, sir.

Q. What did you observe about Allen Carver when you first saw him there?

A. Well, he was a scared, shook up fel. w, just like I or anybody else would have been.

Q. Did he give you any more details than you have given here, or [T 114] do you remember?

A. Well, that's pretty near the biggest thing I remember about it.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Mr. Smith, exactly what time did Allen come to your house?

A. I believe I said around 1:10. Shortly after midnight on September 2nd.

Q. That's what time he got there?

A. When he rang my door bell.

Q. I thought you said it was shortly after midnight?

A. Shortly after midnight, around 1:10. I believe if you check you'll find that.

Q. Well, you're talking about an hour and ten minutes after midnight? I'm talking about when he first rang the door bell?

A. That's right. Around 1:10. On September 3rd, because after midnight would be the 3rd.

Q. And you called the sheriff about five minutes later?

A. Approximately five minutes later, around 1:15.

Q. Around 1:15 you called him?

A. Yes.

Q. Now, did you notice anything unusual about his hands?

A. Well, like I said, they were tied like this (demonstrating) and the belt was pulled tight on him and the belt was hanging down.

Q. How about his feet? Were they tied?

A. No, sir; I didn't notice his feet. He walked up to the house.

Q. How was he dressed?

A. I believe he had on a pair of pants and a shirt—no shirt, I believe. I don't believe he had a shirt on. I may [T 115] be wrong about that.

Q. He lived 400 feet away—did you hear anything going on down at his house?

A. No, sir.

Q. Were you asleep?

A. Yes, sir.

Q. Did he describe the man that did this thing to him?

A. He just told me it was a convict.

Q. Did he give you any physical description of him?

A. I didn't ask him.

Q. Well, did he tell you what happened?

A. He just told me—he come in and he told me, "You wouldn't believe what he did to my wife."

Q. Well, did he tell you in any detail what actually happened?

A. I said, "What do you mean?" He said, "He raped her."

Q. Is that all he said?

A. Well, about that time, you know, the deputy sheriff and all was there.

Q. Did he say anything at all about the baby?

A. Well, the baby was down at the house.

Q. I thought you said that just after you called the sheriff he said, "I left my baby at the house". Is that right?

A. Yes. When my wife asked him about the baby.

Q. In other words, he didn't think about the baby until your wife asked him?

A. That's right.

Q. Now, when you walked out of the house going down there the sheriff or his deputies arrived?

A. That's right.

Q. Did they arrive at your house?

A. They come up to my house.

[T 116] Q. Did you see any of them down at his house?

A. I believe they come directly to my house. I didn't look that way. One car come up to my house.

Q. Did you notice any cars when you got down to his house?

A. Well, he backed his car up and drove it down to the house.

Q. I beg pardon?

A. He took his car and left my house and drove down there.

Q. Who drove the car down there?

A. The deputy.

Q. He drove the sheriff's car down there?

A. Yes, sir.

Q. Did you all ride down there with him?

A. No, sir.

Q. You and Allen walked down there?

A. Allen and them went on and I come on down later.

Q. In other words, you didn't go down to his house immediately?

A. Not immediately, no, sir.

Q. In other words, you were getting ready to go down there, and when you walked out you saw the sheriff's deputy out front and you just turned Allen over to him and they went on down to his house?

A. That's right.

Q. Well, I've already asked you this, but I just want to be sure: There were no deputies or no cars down to his house when you walked out?

A. All I remember is when I was coming out of my house the deputy sheriff's car was there and they were there, and the boy went down there with them.

Q. The deputy drove down there?

A. Yes.

[T 117] MR. BENNETT: I believe that's all.

(Witness excused)

C. H. SULLENGER was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Would you state your name for the record, Dr. Sullenger?

A. Charles H. Sullenger.

Q. By whom are you employed, Dr Sullenger?

A. The State of Georgia, Department of Public Safety, State Crime Laboratory, Georgia Bureau of Investigation.

Q. There are two branches, on[e] in Atlanta and one in Savannah. Which one are you with?

A. I'm in charge of the Chatham County Branch of the State Crime Laboratory.

Q. What degrees do you hold concerning your work?

A. I have a Batchelor of Science Degree with major in chemistry from Arkansas State Teacher's College, Conway, Arkansas, and a Master of Science Degree with a major in biologic chemistry from the University of Arkansas School of Medicine, Little Rock, Arkansas. I've had two years of medical school at the University of Arkansas at Little Rock.

Q. What is your experience with the Crime Laboratory of the State of Georgia?

A. I've been employed by the State Crime Laboratory since the first day of December, 1954.

Q. What capacity do you actually hold with the Crime Laboratory in Savannah, Georgia?

A. I'm director of the branch laboratory.

Q. Doctor, I will ask you did you have——

[T 118] MR. HAYES: Mark that as the next exhibit for the State.

(The bag referred to was thereupon marked for identification "S-10".)

Q. Doctor, would you examine State's Exhibit No. 10?

A. Yes, sir.

Q. When did you first see it, Doctor?

A. That was brought into my office on October the 15th, 1974.

Q. Whose custody has it been in since that time?

A. It has been in my custody.

Q. Is it in the same condition now that it was in when it was brought to you?

A. No, sir. There are two places where I have removed pieces of cloth for analysis; but, other than that, no, sir; there are no changes.

Q. Did you make a test on this, Dr. Sullenger?
A. I did.
Q. Dr. Sullenger, State's Exhibit No. 10, will you point out and tell us what's in the bag?
A. The bag I have labeled "No. 1", it contains on pair of blue shorts——
Q. Let me ask you something, Doctor—did you run any kind of test on Exhibit No. 1?
A. Yes, I examined that—

MR. BENNETT: May it please the Court, we object to any testimony as to the result of any tests until it has been identified and admitted in evidence.

THE COURT: Let's just run through it and identify it.

Q. (BY MR. HAYES) In Exhibit A or 1, what was that, now?
A. A pair of blue men's shorts. In my Item 2, one pink night gown. Item No. 3 contains one bed sheet, and Item No. 4, a plastic bag which contains one pair of white pants, one T- [T 119] shirt, and sox. Those are the items I have.

MR. HAYES: Your Honor, we want to use the doctor, although it might be out of turn, unless they object to it.

(A conference was held off the record between the Court and counsel.)

THE COURT: All right, let's proceed.

Q. (BY MR. HAYES) Dr. Sullenger, who turned that over to you?
A. Captain Kirkland—D. C. Kirkland.
Q. On the card "1", Dr. Sullenger, did you run any test on Item 1?
A. Yes, sir; I did.
Q. Would you mark "A" on that for me, please?
A. This is No. 1. It's labeled "No. 1".
Q. What did you find?
A A pair of men's blue shorts. Those shorts were negative for blood, and I found one small blonde hair on the shorts, and there was no sperm or semen on the shorts.
Q. All right, what about 2?
A. Item 2, which is the pink night gown, it was negative for blood, and also I found no sperm or semen on the night gown.
Q. Now, what about the next item?

A. No. 3 was the bed sheet. The bed sheet was positive for—has blood on it, and I found two short blonde hairs and one brown pubic hair on the bed sheet.
Q. What does the word pubic hair indicate, Doctor?
A. It's a hair from the pubic area or genital area.
Q. On the blood you found on the sheet, 3 there, were you able to make any further analysis of it?
A. No, sir; just that it was blood. And Item No. 4, which [T 120] contains the white pants and T-shirt and sox, the pants were positive for blood and the T-shirt was positive for blood, and I found one long light brown hair on the pants, and that was all that I was able to determine, and all the items were negative for sperm.
Q. And I believe you testified they are in the same condition now they were in at the time they were turned over to you with the exception you testified them?
A. That is correct.
Q. Dr. Sullenger, did you for any reason cut out part of the pants?
A. Yes. There are two places on the pants that I cut out places where I tested for the presence of blood, and also there is a place on the T-shirt that I cut out.
Q. Will you show the jury what you cut out of the clothes to make the test?
A. On the pants there is a place on the left side of the front of the pants and there is a place on the right leg just below the crotch.
Q. You cut that out?
A. Yes, sir; there is a place cut out on that; and on the T-shirt there's a place cut out on the lower portion of the T-shirt that I cut out.
Q. Did you cut that out?
A. Yes, sir; I did.
Q. What about the bed sheet?
A. I believe I cut a portion out of the bed sheet. Yes, sir; this hole that I cut there, and I think there is possibly another one or two in here. Here are two more holes that I cut out for checking both for sperm and blood.
[T 121] Q. You were doing that for testing purposes?
A. Yes, sir.
Q. Now, Doctor, in conclusion, very briefly, you found blood where?
A. I found blood on the pants and on the T-shirt.
Q. What did you see about the sheet?

A. Sir?
Q. What did you say about the sheet?
A. The sheet?
Q. Yes.
A. The bed sheet—excuse me—the bed sheet, the T-shirt, and the pants were positive for blood.
Q. Did you make any other tests concerning the blood other than the fact that it was blood.
A. That is all.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

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[T 122] Q. Now, the bag No. 1, a pair of blue shorts were negative for blood, negative for sperm and semen?
A. That is correct.
Q. That means there was no blood present and no semen or sperm present?
A. I did not find any.
Q. And you found one small blonde hair?
A. That is correct.
Q. One pink night gown negative for blood, sperm and semen?
A. That is correct.
Q. Is that all that you know about the pink night gown?
A. Yes, sir; it is.
Q. Is that all that you know about the pair of blue shorts?
A. Yes, sir; it is.
Q. Now, on the bed sheet, it was positive for blood, but you don't know anything more about the blood?
A. No, sir.
Q. Do you know what type it was?
A. No, sir. The quantity was not sufficient to do a blood typing.

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[T 123] Q. Which test did you run in this case?
A. The hemin test and the benzidine.
Q. Now, what was the hemin test?
A. The hemin test was very, very weak, which indicated that there wasn't enough blood there to make the test for species of origin; but the benzidine test was very—well, it's

a test that's very sensitive. It will detect one part of blood in about a million, and it was positive for blood.
Q. And that test will just detect the presence of blood?
A. That is all.
Q. It will not discriminate as to human or animal?
[T 124] A. No, sir; it will not.
Q. All right, now, the hemin test you said was very weak—would it have discriminated as to the type of blood?
A. No, sir.
Q. So, in any event, even though one of these tests you concluded to be positive, you can be definitely sure that they do not pinpoint it as being human blood?
A. That is correct.
Q. Now, Doctor, do you have any opinion as to how long that sheet was on that bed?
A. No, sir; I have no idea.
Q. Did you actually see the bed that it came off of or the circumstances or environment that it came out of?
A. No, sir; I did not.
Q. You don't know anything else about the sheet, do you?
A. Not of my own knowledge.
Q. Now, you said said there were two short blonde hairs—Doctor, what would make these stick to the sheet?
A. Sir?
Q. Were the hairs embedded in the sheet?
A. Well, they were adhered to the sheet. They weren't embedded, but, like hairs will, they will stick to cloth.
Q. How long were the short blonde hairs?
A. I didn't measure them, but possibly not over an inch or an inch and a half.
Q. Could they have been more than that or less?
A. Yes. I didn't measure them.
Q. You didn't measure them?
A. No.
Q. Did you not consider this significant?
[T 125] A. No, sir; because I did not have any hairs—standards hairs—from anyone to compare them with.
Q. I understand.
A. So, I have no idea who they may belong to.
Q. You found one black pubic hair—are you in position to state who that hair might have belonged to?
A. It was a brown pubic hair. No, sir; I have no idea who

it belonged to. Again, I had no standard hair for comparison purposes.

Q. So, you are not testifying anything as to whether that might have belonged to the defendant here or to either of the victims or any of the people involved in this case?

A. No, sir; I have no idea.

Q. And the pants, you said, were positive for blood, and the T-shirt was positive for blood—now, Doctor, could I get you to hold those pants up again?

(The witness holds the pants up.)

Q. Now, will you put your finger on the hole. Now, that's not in the genital area, as such, is it?

A. No, sir; it's toward the left side.

Q. You're not suggesting that it is blood that might have got there from an act of intercourse or anything like this, are you?

A. I'm making no suggestion whatsoever. I'm just saying that this particular area was positive for blood. How it got there I have no idea. I'm not testifying how it got there.

Q. Have you ever seen pants like these before?

A. Yes, sir; I have.

Q. Do you have an opinion as to what kind they are?

A. Well, they are standard prison pants.

Q. They are dirty, aren't they?

A. Yes, sir; they are very dirty.

Q. They look like somebody might have been running through the [T 126] woods with them?

A. They've been wet. The clothes are still damp.

Q. The clothes are still damp?

A. Yes.

Q. So, this blood could very easily have gotten there by somebody running through the woods, or something like that, and catching on a briar?

A. It may have.

Q. Now, what about the T-shirt, sir? That was the only blood sample you found on the pants?

A. No, sir there was one other, here and in the area of the crotch on the right leg—a small area, in the crotch area.

Q. Would you classify that as being in the genital area?

A. Yes, sir; I would.

Q. Or just below it, possibly?

A. Just below it.

Q. Are you suggesting that that blood might have come

from an act of intercourse?

A. I would have no idea of my own knowledge how it got there.

Q. You would be willing to say its being there would be very consistent with someone running through the woods and snagging or getting caught on snags or briars or something like that?

A. Well, in the crotch area, particularly, I would not expect a person who had been pricked by briars to have gotten blood in that particular area. On the left side of the front of the pants, possibly, but in the genital area I wouldn't expect it.

Q. What about running over a barb wire fence?

A. Well, it's a possibility.

Q. What about the T-shirt?

A. The T-shirt, a large area I cut out here and a large area that I cut out there, and there's a large area there.

[T 127] Q. You have testified the same about the blood samples on [b]oth of those garments there—you couldn't identify them as to human blood or otherwise?

A. No, sir. Even at the present time the cloth is very damp, and even if it's a good blood sample there it's very difficult for determining the species of origin when they are wet.

Q. Well, you don't know anything about the blood type that's on those pants?

A. No, sir; I do not.

Q. You have no opinion as to who might have been wearing them?

A. Well, the shorts have a name in them, but as to who was wearing them I have no idea.

Q. You're talking about the blue shorts have a name in them?

A. Yes, sir.

Q. What is that name?

A. It says, "Ehrlich Coker".

Q. And they were negative for blood—they have his name, but do they show a blood sample to correspond with the location of the blood?

A. I did not find any blood whatsoever. I have checked the holes in the shorts where I checked them for blood and semen. There is no blood area that I could determine in the crotch or near the crotch or anywhere else on these shorts.

Q. Now, Doctor, can you tell me what would be the efficacy or the purpose of a urine test in a case of rape or some illegal, illicit intercourse that is suspected?

A. Well, in a case of this nature, it may be—a sample of urine may be submitted for the analysis of the possible presence of drugs or possible presence of alcohol.

Q. Any other substance?

[T 128] A. Generally, the only two that we would normally analyze.

Q. If a urine sample could be obtained within a reasonable time after the alleged act of intercourse would there be anything else present?

A. If a person had performed the act of intercourse and had not urinated between the taking of the sample, I would expect you to possibly find some sperm in the urine specimen.

Q. Were there urine samples submitted to you?

A. No, sir; there were not.

MR. BENNETT: That will be all.

REDIRECT EXAMINATION

Q. (BY MR. HAYES) On the shirts and pants and on some of those articles did you find a number on there?

A. Yes, sir; I did.

Q. Did you find the same number on the different ones?

A. Yes, sir; I did.

Q. What articles had numbers on them?

A. The shorts had the number, and I believe it was "71".

Q. You say that's the one had Coker's name on it?

A. Yes, sir.

Q. What number is that?

A. Yes, it has 71 on the front of both pants legs.

Q. What about the pants?

A. The pants had the number 71 on it.

Q. What about the shirt?

A. I don't see any number on the shirt whatsoever.

Q. But you find the number 71 on the pants?

A. Yes, there's the number 71 on the pants.

Q. And on the shorts?

A. Yes, sir; it is on the shorts.

Q. Do you know what that number 71 is from your experience in [T 129] the Crime Lab.?

A. These are identification numbers or laundry marks that are usually used around prisons. These pants have the number 71 on both hip pockets.

Q. What you're saying is they are prison numbers?

A. Yes, sir; these are numbers for identification of the clothing.

MR. HAYES: You may come down.

RECROSS EXAMINATION

Q. (BY MR. BENNETT) You don't really know for a fact what those numbers are, do you, Doctor? You were guessing based on your prior experience?

A. My prior experience and working in the prison system, this is what I've always run across, that this is the way they number their clothes.

MR. BENNETT: All right, sir, I have no further questions.

(Witness excused)

ELNITA CARVER was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Elnita, state your name for the record and talk so this jury can hear you.

A. Elnita Carver.

Q. Are you married, Elnita?

A. Yes, sir.

Q. Who are you married to?

A. Allen David Carver.

Q. Elnita, do you have a child?

A. Yes, sir.

Q. Is it a boy or girl?

A. A boy.

[T 130] Q. What's its name?

A. Charles Allen Carver.

Q. When was he born?

A. On August the 10th.

Q. Now, I bring your attention back to September 2nd, which would have been maybe some twenty or twenty-two days later—where were you then, Elnita?

A. I was living on State Street.
Q. Is that here in Ware County?
A. Yes, sir.
Q. Where had you been prior to that date, Elnita?
A. I think I'd been with my mother part of the time.
Q. Where had you been prior to staying with your mother? Had you been in the hospital?
A. Yes, sir.
Q. Where were you in the hospital?
A. In Homerville.
Q. Back on this date, September 2, you'd got home here in Ware County?
A. Yes, sir.
Q. I bring your attention to this night at perhaps eleven o'clock, where were you at this time, Elnita?
A. At my home.
Q. Now, who was there?
A. Me and my husband and my little baby.
Q. And how old was your baby at that time? I'm talking about September 2nd.
A. It was two or either three weeks old.
Q. You say your child was born on August 10th?
A. Yes.
Q. And this was September 2nd?
[T 131] A. Yes, sir.
Q. Now, what were you doing at your home this night?
A. Well, at first we were just sitting around, and then I took a bath, and after that we started fixing supper.
Q. You say you and your husband and little baby were at home?
A. Yes, sir.
Q. And you were cooking supper? Is that right?
A. Yes, sir.
Q. How many rooms in the house—how large is the house you all lived in?
A. It was a small house, with a living room and a kitchen was combined together.
Q. The living room and kitchen were just one room? Is that right?
A. Yes, sir.
Q. How many other rooms did you have in the house?
A. It had one bed room and one bath room.
Q. So, really, it had two rooms, a living room and kitchen

one room and had one bed room and a bath room, and that's all it had, wasn't it?
A. Yes, sir.
Q. A small place?

MR. BENNETT: Now, your Honor, we object to Mr. Hayes testifying for the witness. We want to hear what she has to say, not Mr. Hayes. We object to unnecessary leading, and I think he's doing that at this time.
THE COURT: Don't lead the witness.

Q. (BY MR. HAYES) Elnita, who was doing the cooking?
A. At first I was cooking and my husband was in there taking a shower, and when he got finished he come out and he started helping me cook supper.
[T 132] Q. Where was your three weeks old baby at that time?
A. In the bed room in his bassinet.
Q. Did anything unusual happen that night, Elnita?
A. Yes, sir.
Q. About what time was this the best you can tell us?
A. It was around eleven or eleven-thirty.
Q. Around eleven or eleven-thirty that night? Is that right?
A. Yes, sir.
Q. And, tell the jury when you first noticed something wrong.
A. Well, I was standing up there cooking and we'd left the doors unlocked, and this man opened the door and come in and we looked around at him and he had a board and had it held back and told us to go into the bed room.
Q. And who was there at that time?
A. Me, Allen and the baby.
Q. You say the door was closed but wasn't locked? Is that what you said?
A. Yes, sir.
Q. And when the door came open you saw the man? Is that right?
A. Yes,sir.
Q. What did you say he had in his hand?
A. A board.
Q. The best you can tell the jury how was he holding this board or stick or whatever he had in his hand at that time?
A. He had it back, something like that (demonstrating).

Q. Had it back?

A. Yes.

Q. What happened then, Mrs. Carver?

A. Well, he had it back and we started looking at him, and he said, "I tell you all to get in the bed room", and it scared me [T 133] and I just stood there staring at him, and my husband, he looked at him and he said, "What did we do?" He say, "Nothing. Just get in the bed room." And Allen said, "Well, first I want to know what we done." He said, "Just get in the bed room," and we noticed that he had on some white pants that was out from the prison place, and Allen told me to do like he said, and we turned around and we walked in the bed room, and when we got in the bed room he told Allen to lay down on the bed, and Allen lay down on the bed and he lay down on his back, and he told him to get on his stomach, so Allen got on his stomach, and then he asked me for something to tie him up with, and I had a halter top blouse, a white one, and I think it was on top of the dresser and I got that and gave that to him, and he told me take it and tie him up. He told me to tie his hands with it, and I started to tie his hands. When I got it tied he come up there to shake it to see if it was tied good enough. He pulled on it and he said it wasn't tied good enough, so he started pulling on it and he tore the halter top up; so, he took that off and he told me—he asked me did I have any hose or anything, and I said I didn't know. He told me to look, and I started looking in the dresser thing, and he come up there after I started looking and he looked in this other one and he started pulling everything out looking for hose, and he took one of the drawers out and set it up on the dresser, and when he got some hose he told me to tie them on his hands; so when I tied them on his hands he come up there and tied it tighter. He said it wasn't tight enough. And he told Allen to get up and go in the bath room, and Allen said, "How can I?" He said, "I can't go in there." And he said, "Yes, you can." I don't remember how he got to the bath room, but he got there. And then he told him to get up on the thing to the bath tub and put his [T 134] hands up on the shower rod, and, so, he got up there and put his hands up there, and when he put his hands up there that man tied his hands to the shower rod, and he come back out and he asked did I have a knife, and I said, "No," and he said, "You don't have a kitchen knife?" And I said, "Yes, I got

one of them," and he said, "Well," he said—he said "first, go in there and lock and back door and turn off the lights," so as I started to go in there he grabbed my arm so I couldn't run, or anything, and I went in there and cut the lights off first and then locked the doors.

Q. Now, where was your baby at this time?

A. He was still in the bed room in his bassinet.

Q. All right?

A. And, so, anyway, after I got the doors locked and the lights turned out he told me to go looking for a knife, and I couldn't see in there because it was dark, so I pulled out the drawer and started feeling in there for a knife and I couldn't feel anything that felt like a knife, and then I remembered I left a knife in the dish water that I washed dishes in, and I felt in there and got a steak knife, and as I reached up with it he said, "Do you have one?" And I said, "Yes, I think", and he grabbed it before I had time to hold it any tighter.

Q. Now, let me ask you about this: Why did you actually look for a knife for him at that time?

A. Well, at first I started to say I didn't have a knife, and I did say I didn't have one, and so he asked for a kitchen knife. I knew that he'd know I was lying if I said I didn't have a kitchen knife, because we had all kind of dishes and stuff in the kitchen and I knew he knew I had a knife in there.

Q. Mrs. Carver, were you extremely afraid at this time?

A. Yes, sir.

Q. Afraid for what?

A. Well, I had the little baby there, and I thought he might [T 135] hurt him and Allen also, and I didn't want anything to happen to the baby.

Q. And where was your husband Allen at this time?

A. He was still tied up to the bath tub.

Q. And he got the knife from you, and, Mrs. Carver, at this point would you look at State's Exhibit No. 2?

A. Yes, sir.

Q. Have you seen that before?

A. Yes, sir.

Q. Who had that knife?

A. That man that made me get it for him.

Q. Mrs. Carver, when he got the knife what did he do with it?

A. He told me to get back into the bed room, and he kept holding onto my arm and said that I could get loose and that's when he told me to get back in the bed room.

Q. Mrs. Carver, you went back in the bed room and what happened then?

A. And then he told me to go on into the bath room and said he was going to check and make sure my husband was tied up good, and he went in there and he looked at him, and he said no, he could get down from there, so he untied him and told him to get down and told him to get under the sink, and when Allen got under the sink he tied his hands to a pipe to the sink, and then he told him to put his feet under the commode, and he tied his feet to that.

Q. He tied his feet to the commode and tied his hands to what?

A. To the pipe thing under the sink.

Q. And what happened then, Mrs. Carver?

A. Well, after that he carried me back into the bed room and then he looked and he saw the baby in the bassinet, so he got hold [T 136] of the bassinet and he pushed it on into the bath room, and after that he come back in there and he asked did we have any cigarettes, and we said, "No," and so he said, "Do you smoke?" And we said, "Yes, but we don't have any cigarettes." He said, "Well, are there any cigarette butts in the ash tray? And I said, "There might be. I don't know." And, so, he said, "Well, go in there and look for some," and I started to go back in there and he grabbed my arm again and he said he was going with me, and I went in there and I didn't know where the ash trays were because it was dark and I'd have to go around feeling for the ash trays to find a cigarette butt, and so when I found one I gave it to him and he told me to go back into the bed room, and I went back in there, and he smoked that, and a few minutes later he asked me if we had anything to drink, and we told him that we didn't drink, and he said is there anything in the house that he could drink, and Allen told him that there was some milk in the refrigerator and he said he didn't want that, and, so, then, we'd made some tea; we made it before we started fixing supper so it would be cold for supper, and, so, we told him we had some tea, and he told me to go in there and get that, so I went to the refrigerator and got out the pitcher of tea, and he said, "Now, find a glass to pour it in," and I went to the sink and

looked in the cabinet and got a glass and I gave it to him, and he said, "Now go back in the bed room," and I went in there and he kept on drinking tea. We had a whole pitcher full and he drank just about all of it, or all of it, and then after that he asked did we have a gun, and we told him no. And he asked Allen, and Allen said no, he couldn't even buy one.

Q. At the time he asked this you and he were where?

[T 137] A. In the bed room.

Q. And where was your husband, Allen?

A. He was in the bath room, and he had me standing there at the door to the bath room.

Q. He had you standing at the door?

A. Yes, sir.

Q. Was that before he had your husband tied up, or your husband could still talk? Is that right?

A. Yes, sir.

Q. Then what happened, Mrs. Carver?

A. Then after that he said, "Well, do you have any money?" And Allen said, "I don't know. Not all that much." And he said, "Well, how much?" And Allen told him how much it was.

Q. How much did he tell him he had?

A. I think it was twenty dollars and about thirty cents.

Q. All right?

A. And he said, "Well, where is it at?" And Allen told him where it was.

Q. Where was it, Mrs. Carver?

A. I'm not sure, but I think it was lying on the dresser in his billfold.

Q. All right?

A. And he told me to get it and I got it and handed it to him, and he looked in there and he got out the money, and then he started looking through the things, at the driver's license and Social Security card and all that, and he took out the driver's license and he said—when he started to go he said he was going to need that in case he got stopped and said they'd think that was him; and after that he asked Allen for the keys to his car, and Allen told me to get him the keys to the car, and I [T 138] gave them to him, and he asked Allen was the car—was it tore up or anything, and Allen told him that when he cranked it—that when you crank the car there's something wrong with it, and he had

some wires wired up on the inside, and that when you turned the key to the car to crank it you had to put those wires together to get it cranked, and, so, then that man, he asked me if I had ever drove the car before, and I didn't know he wanted me to crank it for him or anything, and so, I said, "Yes, I have drove it." He said, "Well, I'm going to take you out there to show me how to crank the car," and he said, "Go ahead and get you some clothes," and he said, "I'd better be getting on the way now and go ahead and leave," so, then, some cars started coming by making a siren noise, or something like that, and every time a car would come he'd get to the window and look out the window to see who it was, and, so, he told me—he had asked Allen for some clothes to put on, and Allen told him the only clothes he had was in the closet, and, so, he went in there and he got out, I think it was some dungarees. I think it was too big for Allen, and I remember he got a shirt and he put it on, and then he told me to put my clothes on so that I could show him how to crank the car.

Q. What did you have on at that time, Mrs. Carver?

A. A gown.

Q. I believe you said you'd just taken a shower? Is that right?

A. Yes, sir.

Q. All right?

A. And, so, I looked in my dresser drawer and got out a pair of shorts and a blouse, and that's all I could find because we'd just washed clothes and it was all left in the living room and I didn't think he'd let me go in there to get anything, so I got that out and I started to put on the shorts without taking my [T 139] gown off, and then I asked him could I go in the bed room—I mean the bath room to change clothes, and he said no, that he'd saw plenty of naked people before and he told me to go ahead and change the clothes right there, and, so, I turned around towards the other way so he couldn't see me, and when I started to pull off my gown——

Q. When you started to pull off your gown, Mrs. Carver, look over and tell the jury what happened.

A. Well——

Q. You will have to tell the jury what happened, Mrs. Carver.

A. When I pulled off my gown he come up there and

started feeling of me—he come up to the back of me and started feeling of me, and I started crying and and I told him to quit, and he kept on saying that he wouldn't hurt me, and that I'd better shut up, and I kept on telling him to quit and not mess with me. I told him not to touch me, or anything, and he gaged Allen so that he couldn't talk. I think it was with a piece of underwear and then tied something around his mouth, and he closed the bath room door so that Allen couldn't see him, and then he kept on feeling of me and I kept crying and telling him to quit, and Allen started trying to say something, and I couldn't understand what he was saying. He was mumbling something. And I kept on telling him to quit and he said, "I ain't hurting you, am I?" And I was scared and I didn't know what to say, and I just shook my head no, and I didn't say nothing and he said, "I want your husband to know that I ain't hurting you." He said, "Tell your husband I ain't hurting you." And I just said, "Uh, huh," like that. I didn't say it loud, and he said, "He can't hear you saying it like that," and, so I said, "No." And then he said—he said, "Come on out and tell your husband that I ain't hurting you if [T 140] I ain't," and, so, I said, "Allen, he ain't hurting me," and I kept crying and I kept telling him to quit, and then he asked me—he said, "When is the last time you've been with your husband?" And I said before I had the baby, and he said, "Well, it's time again, ain't it?" And I didn't say nothing.

Q. Let me ask you, were you, in fact, sick at that time besides having had the baby?

A. Yes, sir.

Q. How were you sick besides just having had the baby?

A. Well, I still was menstruating from having the baby and I was weak, and everything.

Q. What happened, Mrs. Carver?

A. Well, he told me—when I pulled my gown off he told me to go ahead and take my shorts off, and, so, I took my shorts off, and then he told me to lie on the bed, and then I think he'd had that knife in his pocket, and he pulled it out and put it on the dresser——

Q. (Interposing) Mrs. Carver, somebody was coughing back here—he told you what, now?

A. He told me to take off my clothes, and I took them off, and then he told me to lay down on the bed, and I lay down, and I guess he had the knife in his pocket. He took it out and he put it on the dresser, and after that he took off his

clothes and then he laid down and he picked the knife back up again and he held it up at me.

Q. Show the jury how he held the knife up at you.

A. About like that (demonstrating).

Q. Here's the knife. Show the jury how he held the knife at you

A. About like that (demonstrating).

Q. All right?

[T 141] A. And he looked at me and he whispered and he said, "You know what's going to happen to you if you try anything, don't you?" And I was scared and I didn't know what to say, so I shook my head yes, and so he put the knife back down and he lay down and started feeling of me again. He kept on doing that for a few minutes, and then he told me to straighten my legs out, and so I did that and he got on me and started to having sex.

Q. Did he put his private part in your private part?

A. Yes, sir.

Q. Was this by force and against your will, Mrs. Carver?

A. Yes, sir.

Q. Just go ahead and explain to the jury what happened.

A. Well, he kept on—he was on top of me and he kept on, and directly he got up and he told me to get on top of him, so, I got up and got on him, and he kept on till he got finished, and then he told me to get up and I got up.

Q. In the meantime what had he done with this knife after he put it to your throat, Mrs. Carver?

A. He had it on the dresser.

Q. How far was it from where his hand was at that time?

A. Well, the bed was right here (indicating) and he was laying right here on this side and the dresser was right there by the bed.

Q. Was that knife in reach at all time?

A. Yes, sir.

Q. All right, what happened then, Mrs. Carver, after he raped you?

A. Well, he told me to get up, and so I got up, and I said, "Can I put my clothes on now?" And he said, "Yes, you can do whatever you want to," and so I put my clothes on and he got up and put his on, and then he went in there and started asking Allen if he had a road map, and Allen said, "I don't think [T 142] I do," and, so, he says, "Well, do you know how I could get to Atlanta?" And Allen said,

"No, I don't know." So he asked me, and I said, "I think you go through Waresboro and Millwood to get to it," but I said, "After you pass Millwood I don't know the rest of the way," and so I had the keys, and he looked at Allen and he said "Well, are you sure that car cranks," and Allen said, "Yes," and every time that man talked to Allen he pulled that thing off of his mouth so he could hear what Allen said, and, so when he finished talking to him he put it back up to his mouth, and he said, "I'm going to take your wife out there with me and let her show me how to crank the car," and he said, "When I get back you better not be trying to get loose, or anything." And, so, then, he told me to go on out and get back in the bed room, and he caught hold of my arm and he pushed the door back shut, and he carried me on there to the living room and we had clothes in a basket that was in the floor, setting in the floor that we hadn't put up yet, and I couldn't see going through there because he shut the bed room door as he went out so there wouldn't be any light shining in on him; and as I was going to the door I bumped into the fan and it made a noise and he jerked me and he said, "There ain't no need in you trying to make noises because nobody ain't going to hear you," and so then when I got to the door and I opened it this car started coming by, and I was fixing to go out and he held onto my arm and said, "Wait a minute." He said, "When I go out there ain't going to be no cars or anything going by." And when that car went by he said, "When we start to go out to the car," he said, "I want you to run and get in the car just as fast as you can before anybody stops us," and, so, as I started to go out he started pushing me making me run, and, so, when I got to the car I got on it as fast as I could and he got in on the driver's [T 143] side, the same side he made me get in on; and so he asked me how did I crank the car and I showed him, and he cranked it to make sure it would crank like that, and then he cut it off and he said, "We're going to go back in to see what your husband is doing—if he's trying to get loose or not," and so I got out and he started making me go fast again to get in the house before any cars came by, and he went in and shut the door and locked it and then he told me to go back into the bed room, and all the time he kept on holding onto my arm so that I couldn't get away, and when I went into the bed room he went on in and he opened the door to the bath room, and

he said something or other like he wasn't trying to get loose or anything, and then he said, "I'm going to take your wife with me, and if I don't get stopped by a police car or anything before I get to Waresboro," he said, "I'll tie her up and put her out at the station in Waresboro at that corner," so Allen believed him and I guess he thought he was going to really do that, and he pulled the thing back down on Allen's mouth.

Q. Where was Allen then at the time he was talking to him?

A. In the bath room.

Q. Still tied up and gagged?

A. Yes, sir.

Q. All right, what happened then?

A. Well, he pulled the gag off of Allen's mouth when he was talking to him, and Allen said, "Well, just make sure you don't hurt her," and he put the gag back on his mouth and he said—he said, "Well, I'm taking her with me." He said, "If you get loose and call the police," he said, "any time I see a police car pull up behind me and motion for me to get over or something like that," he said, "your wife is going to be dead."

Q. Where was the knife at that time, if you know?

[T 144] A. He had got it and put it back in his pocket.

Q. Where?

A. His pocket. I think it was his back pocket.

Q. All right?

A. And he told Allen—he said that I'd be dead if a police car or anything pulled up behind him, and then he said he was going to take me on and he said he would be sure to tie her up and put her out at that station where you all can find her. Then he got me by the arm and taken [sic] me on out into the bed room again and he shut the bathroom door, and then he carried me into the living room and shut the bedroom door, and he come up there and told me to unlock the door and I unlocked it and he looked to see if any cars were coming, and he told me to go just as fast as I could and get in the car, and, so, I went to get in the car, and when I got in the car he cranked it up and he didn't turn the lights on, and I looked at him and I said, "You ain't going to turn the lights on?" And he said, "No, not until I get out of here so I ain't going to get spotted."

Q. Mrs. Carver, did he have you to sit any particular place in the car? If so, where?

A. Well, when I got in the car I was going to get on the other side, and he said, "Now, I want you to set right by me, because," he said, "if you're setting right by me they'll think we're a girl and boy going together and won't think I'm somebody that they're looking for," and, so, he made me set there by him, and when he got on the highway on State Street starting going back up towards town he said—he said, "Now, you got to show me what road to turn off on to get to Waresboro," and, so, when we got almost to that 7/11 Store on State Street by Blackshear Avenue, I think, and I said, "Turn to the right there," and, so, [T 145] when he got up there he turned left—to the right and he went on, and he didn't hardly say anything, and then when we got to the end of that street up there at that caution light I told him to turn right and go on into Waresboro, and that was getting on Albany Avenue, I think, and he turned and started going that way and when we got almost to Cauley's Meat Plant—we weren't too far from that, anyway, and he said, "Did you recognize the car?" And he told me what kind it was. I don't remember what he said. He asked me did I see it parked somewhere, and I said, "No," and he said, "Well, that was somebody there that was looking for me," and, so he kept on going, and then directly I said, "You were in prison, weren't you?" And he said, "Yes, and I bet you'd like to know what I was in there for, too, wouldn't you?" And I shook my head yes, and he said, "Well, I was in there because"—I think he said he was living in Atlanta——

Mr. Bennett: (Interposing) May it please the Court, we object to any statement that might have to do with his prior record. That is putting his character in evidence before he has done so.

The Court: All right, let's omit that and go on.

The Witness: Well, anyway, we kept on going and he kept going till he got to Waresboro, and when he got to that station he looked at it and he started laughing and he said, "Is that the station you were talking about?" And I didn't say nothing. He kept going, and directly I said—after he passed it a little ways I said, "Well, where are you going to let me out?" And he said, "When we run out of gas," he

said, "I reckon we'll both get out and start walking." And, so, he kept on going and didn't say nothing else, and he went on out of Waresboro, and then he went for a few miles and come up to some place that [T 146] had two roads—two highways, and had a gas station there.

Q. If you know, was that the intersection where you go to Douglas, if you know?

A. I think it had one that went straight and the other one went the other way.

Q. All right?

A. And, so, we went on past that and kept going a pretty good ways, and this car that was behind us went on out and got in the other lane and got in front of us and he kept on going, and I was so scared I just noticed that it was a car and wasn't looking to see what kind, or anything, it was, and we kept on going, and then all of a sudden he slowed down and he said, "Is that a police car up there?" And I said, "I don't know." He said, "Well, I think it's a road block." I didn't say nothing, and he said, "Show me a dirt road to turn off on," and I didn't know where one was, and he kept going, not too far from there, and I saw a dirt road going out that was a dead end road with an old house out there, and I didn't know what was out there, and I said, "There's a road you can turn down," and he turned on that road and we got down and it was a dead end with an old house out there, and he said, "Well, it don't look like we'll get any further in this," and he turned the car and he turned it so it would be headed back up towards the highway and he parked it right there in front of that old house, and he set there and he said, "Are there any cigarettes in the car?" And I said, "I don't know", and he started looking in the—looking around in the ash trays and everything and he couldn't find one, and he said, "Are there any in the glove compartment?" And I said, "I don't know." And he said for me to open it, and there wasn't anything in it, so he set there for a while.

[T 147] Q. Did he have you sitting any particular place at that time in the car?

A. He still had me setting by him.

Q. Then what happened?

A. Well, he set there for a while, I guess thinking or something, and then he looked at me and he started unbuttoning my blouse, and I didn't say nothing to him and he started

feeling of me again, and he kept on doing that for a few minutes, and there were mosquitoes in there because the back door—I think it was the back door to that car you couldn't let it up and the mosquitoes were getting in there, and I started scratching my legs because mosquitoes were biting me, and he said, "What is it? Mosquitoes biting you?" And I didn't say nothing, so he pulled my blouse back together, and he said, "Well, I don't want anything biting on that but me," and I didn't say nothing. When he pulled my blouse back together I pulled it a little tighter, and he set there, and then he waited a while and I said, "How long are you going to stay out here?" He said, "I'm going to stay until that road block leaves." I said, "How long is that?" And he said, "It will probably be there until in the morning." So, I didn't say nothing, and we kept on setting there a while.

Q. Why didn't you say anything, Mrs. Carver?

A. I mean, I just didn't know anything to say, and I was scared to ask him the question that I did ask him.

Q. Were you then afraid?

A. Yes, sir.

Q. All right?

A. He kept on setting there for a while, and then he said, "If that road block don't leave," he said, "I'm going to get you [T 148] to do something for me." I said, "Well, what is that?" And he said, "We're going to go back out there and we're going to go back towards Waycross, and", he said, "we're going to go around and going to try to find one that just has a lady in it, and", he said, "I'm going to have you to go up there like a good little girl and knock on the door, and," he said, "I'm going to be standing there by the door and when she comes out you're going to tell her 'hey', and everything, and," he says, "I'm going to jump up there and scare her with this knife, and", he said, "we're going to go in there and tie her up and get all her money and take her car, and", he said, "this car here ain't no good because it's about tore up and don't have hardly any gas in it," and he said, "We're going to take her money and get her car," and I didn't say nothing, I just kept setting there, and then a few minutes later after that, about ten minutes later, this car come up there and it turned in on that dirt road, and it come up there and it parked right up in front of us, and he said—he said, "I think that's a policeman

right now," and I didn't say nothing. He said—he said, "Well, I reckon they're going to get me now, and," he said, "I won't never get away." And I kept on setting there, and right after that one come up and parked some more cars started coming up and they all parked and all I could see was the lights shining, and then all those men got out and they started coming up there and they told him to get out of the car, and he set there for a minute and then he got up and got out of the car and they took him to the back and searched him and handcuffed him, and then a man come up there—I didn't know him, and he come up there to the car and he looked at me and asked me was I okay, and I shook my head, "Yes", and so then he said, "Wait just a minute and I'll either [T 149] find someone to drive you home or I'll drive you home myself," and, so, he went up there to make sure they had that man in the car, and then he come back there and he got in the car and he said he'd drive me home, so he waited for all the police cars to get out of the way so he could drive on through, and he drove on up there till he got to the paved street and I think there was some police cars stopped down there, so he stopped and got out and started talking to them, and, so, then another man (I don't know who he was) come up there and he asked me—I guess Allen had called him and told him he had a knife—

MR. BENNETT: (Interposing) May it please the Court, that would be hearsay.

THE COURT: That would be hearsay.

MR. HAYES: That's correct. Don't tell what somebody told you.

Q. Let me ask you this question: While you were in the car do you know what he did with the knife?

A. Yes, he had it up in the sun visor of the car.

Q. He had it in the sun visor of the car?

A. Yes, sir.

Q. Let me ask you this, Mrs. Carver: Were you taken to the hospital after that?

A. Yes, sir.

Q. Now, a while ago you stated that he took a billfold and money?

A. Yes.

Q. Mrs. Carver, do you recognize these items there?

A. Yes, sir.

Q. What are those items? Let me give you the exhibit numbers. I have reference to State's Exhibit No. 9 and the contents. What is that, Mrs. Carver?

[T 150] A. That's my husband's bill fold and his driver's licens[e] and Social Security card.

Q. Where were the driver's license and Social Security card that night?

A. It was in Allen's billfold.

Q. And, do you recognize them as being his driver's license and billfold, and so forth?

A. Yes, sir.

Q. And is that what the defendant made you give him?

A. Yes.

Q. Mrs. Carver, was all this done to you forcibly and against your will and because of fear?

A. Sir?

Q. Was all this forcibly and against your will and due to the fear you had?

A. Yes, sir.

Q. Was it all done in Ware County, Georgia?

A. Yes, sir.

Q. Mrs. Carver, let me ask you this: I hand you State's Exhibit No. 5. Will you just look at it and tell us what that is, if you recognize it?

A. One is my bra.

Q. Hold it up so they can see what you're looking at.

A. My bra.

Q. All right?

A. And this is part of the halter top that he had me to tie Allen up with.

Q. All right?

A. And that's another part of the halter top.

[T 151] Q. Was that used on this occasion, Mrs. Carver?

A. Yes, sir. That's the towel he tore up and used to tie Allen up.

Q. All right, what else is in there?

A. And the hose that he made me get to tie his hands up with.

Q. Anything else?

A. This is my pair of panties.

Q. If you know, Mrs. Carver, what is this? Look at State's No. 8, and if you know, tell us what it is.

A. This is Allen's shirt.
Q. Do you recognize that as being Allen's shirt?
A. Yes, sir.
Q. Is there anything else that you recognize?
A. And this is a pair of brown sox.
Q. Whose sox?
A. Allen's.
Q. All right?
A. I don't recognize that.
Q. All right, examine State's Exhibit No. 3. If you know what it is, tell us.
A. That's a pair of underwear.
Q. Is that your pair of underwear?
A. Yes.
Q. What was that used for on this night?
A. That night he stuck it in Allen's mouth to gag him with.
Q. Now I hand you marked No. 2, which is part of State's No. 10. Look at that and see if you recognize it.
A. Yes, sir; it's my gown that I had on that night.
Q. Is that the gown you had on that night?
A. Yes, sir.
Q. Now, did you actually see the sext act itself?
[T 152] Q. When the rape occurred did you have it on or have it off?
A. Well, when that occurred I had already taken it off to change clothes.
Q. Mrs. Carver, when he actually raped you did he have on any clothes, or did he take his off?
A. He had taken them off.
Q. Mrs. Carver, let me show you this and if you know tell me. I don't know whether you know or not.
A. It's that man's underwear—I guess it's the underwear he had on.
Q. What about this, if you know?
A. Yes, this is the prison clothes that he had on when he first come in.
Q. Is there any number on it?
A. I don't see it.
Q. Mrs. Carver, when he got your husband's clothes and put them on, where did he leave his prison pants and his clothes that he had there?

A. He left them at the house. I think he put them on the floor.
Q. In what room of your house?
A. The bed room.
Q. If you know, what all did he have there?
A. I'm not sure, but I think he left his pants and that shirt he had on, and that's all I know what he left.
Q. What pieces of your husbands, if you know, did he get?
A. I think he got that pair of sox and a pair of blue dungarees and a white shirt.
Q. Mrs. Carver, Is the person that committed this rape on you that night and robbed you in the court room now?
A. Yes, sir.
[T 153] Q. Would you look around and see if you see him? And point at him?

(The witness points)

Mr. Hayes: Let the record show she is pointing at the defendant Coker. You may cross examine.

CROSS EXAMINATION

Q. (By Mr. Bennett) Mrs. Carver, when did you and your husband get married?
A. April 7th.
Q. Of what year?
A. 1974.
Q. And the baby was born in August, '74?
A. Yes.
Q. Now, Mrs. Carver, I just want to ask just a few questions about your testimony. I believe you stated that when Coker came into the room in your house that you were in the kitchen cooking?
A. Yes, sir.
Q. Where was your husband at this time?
A. In the kitchen also.
Q. In the kitchen what?
A. Also.
Q. He was in the kitchen also?
A. Yes.
Q. What was he doing just before this occurred?
A. Well, first he had took a shower, and after that he come in there and was helping me fix supper.
Q. Helping you fix supper?

A. Yes.

[T 154] Q. And then this man came in the house and you said that he was holding a stick or a board?

A. Yes, sir.

Q. Will you describe for me, please, how he was holding it?

A. He had it back like that (demonstrating).

Q. In other words, the stick part was actually over his head?

A. Yes.

Q. How long did he hold it back like that?

A. He kept it like that until he got us in the bed room and had Allen tied up on the bed, and he carried Allen into the bath room and tied him up to the shower curtain, and then he grabbed me by the arm and started asking for a knife, and he made me go in there and turn off the lights and lock the doors and get the knife, and when I got the knife he took it and then he went back in there and he laid the board down.

Q. That's when he laid the board down?

A. Yes.

Q. And all that time he was holding the board over his head?

A. He didn't have it over his head after he got Allen tied up. He just kept it in one hand and he was holding my arm with the other one.

Q. Well, the question I was trying to ask was how long did he actually—he came in the house with the board drawn back as if to strike—how long did he actually keep it in that position before he dropped it?

A. Probably about ten or fifteen minutes.

Q. In other words, time enough to get you back into the bed room—get the two of you back in the bed room?

[T 155] A. And get Allen tied up.

Q. And all the time that you were tying him up?

A. Yes.

Q. And when he was helping to tie him up and checking your knots, and so forth?

A. When he started to tie him up he put it in his lap.

Q. He put it in his lap?

A. Somewhere like that.

Q. Was he sitting down?

A. Yes.

Q. You mean Coker, the man, started sitting down?

A. Yes.

Q. Where did he sit?

A. On the side of the bed.

Q. And he laid the stick across his lap?

A. Yes.

Q. Did he have the knife at this time?

A. No.

Q. Now, where was the baby when he came in?

A. It was in the bassinet asleep in the bed room.

Q. In the bed room?

A. Yes.

Q. Did the man see the baby when he first came in?

A. I don't think he did.

Q. Now, when do you think he first noticed the baby?

A. I think it was after he got Allen tied up and he come back in the bed room. I think that's when he noticed the baby was in there.

Q. Now, what did he do about the baby, if anything?

[T 156] A. Well, he didn't do anything right then until he had made me go in there and get him a knife and find him some cigarettes and something to drink. When he come back in there he took the baby and pushed him into the bath room. Every time he'd start to go in the bath room he'd always make me go in the bath room and stand against the wall on the opposite side.

Q. Mrs. Carver, in all honesty, he didn't threaten that baby, did he?

A. I don't think so.

Q. He didn't try to play that baby against you or anything like that, did he? In other words, he at first didn't realize the baby was there, and then when he did realize it was there he pushed it in the bath room? Is that right?

A. Yes, sir.

Q. As a matter of fact, didn't he push it in the bath room so that your husband could see it after you all left—to be close to it after you all left?

A. He pushed it into the bath room after he tied Allen to the sink and left it in there.

Q. So that the baby would be close to Allen? Is that correct?

A. I guess.

Q. All right. Well, let me ask you this: Maybe it's an improper question, but weren't you, at least—well, I won't ask that. Now, Mrs. Carver, when did the man ask about the money the first time?

A. He asked me about it one time before he ever carried me out to the car to get it cranked.

Q. When was that? When was that in relation to when he came in?

A. It was after I had got him something to drink, and everything, and he had already raped me.

Q. Now, did your husband say anything to him about the money?

[T 157] A. He said yes, he had a little bit of money.

Q. When did your husband say that?

A. After he asked him for money.

Q. After he asked him for the money?

A. Yes.

Q. You say the man asked your husband for the money?

A. Yes, he asked him did he have any.

Q. What were his exact words?

A. Allen said he didn't have—

Q. (Interposing) No, I mean what were the man's exact words?

A. I don't remember.

Q. Mrs. Carver, actually, didn't your husband tell the man he could have whatever money without the man actually asking him for money.

A. He said that before right then that man asked where—did he have any money.

Q. You mean after your husband had said he could have the money, then the man asked where it was?

A. He didn't say that he could have the money. He said he could have anything that he wanted just so he didn't hurt any of us.

Q. If your husband testified previously both at the commitment—do you remember going to a commitment hearing before Judge Allen back in September shortly after this happened?

A. Yes.

Q. Were you in the room there when your husband testified?

A. I'm not sure.

Q. Well, it doesn't matter, but if your husband testified back in September and again today to the effect that the man never actually asked him for the money, would you say your husband is incorrect?

[T 158] A. I don't know what my husband said.

Q. Well, I'm askin[g] you if he testified that would you say he's worng?

A. I don't remember him saying that he could have the money. All I remember him saying was that he could have anything he had, just so he didn't hurt us.

Q. So, really, what you're saying is you don't remember? In other words, it could be like your husband said—you just don't remember. I realize you're upset.

MR. HAYES: That's argumentative.

MR. BENNETT: Well, I don't mean to argue.

THE COURT: Don't argue with the witness.

Q. (BY MR. BENNETT) Am I correct in that, or is it some other way, Mrs. Carver?

A. I don't think Allen said he could have the money. All I remember him saying was that he could have anything he wanted just so he didn't hurt any of us.

Q. The man didn't ask for money, did he?

MR. HAYES: Your Honor, he's gone over this time and again.

THE WITNESS: He did once.

Q. (By MR. BENNETT) And that was—

A. Before he carried me out to crank the car.

Q. Mrs. Carver, do you recall how long the man's hair was at that time?

A. It was short. It wasn't as short as it is now.

Q. Was it about the length of Mr. Strickland's hair here?

A. It might have been.

Q. In other words, it wasn't short like it is now?

A. No.

Q. Now, another thing that I wasn't quite clear on—when did [T 159] the man put on your husband's dungarees? Was it before he had sex with you or afterwards?

A. He had put it on before, and when he started with that he took them off again.

Q. He took the dungarees off?

A. Yes.

Q. And when he got through he put the dungarees back on?

A. Yes.

Q. So that to your knowledge, at any time after this alleged sex act did he put the prison pants back on?

A. No, he hadn't put them back on.

Q. Now, Mrs. Carver, did you cry out when he started having the sex act with you?

A. I kept on crying, and every time I'd cry he'd tell me to be quiet if he wasn't hurting me.

Q. He said be quiet and he wouldn't hurt you?

A. If he wasn't hurting me.

Q. I didn't understand. He said be quiet if he wasn't hurting you?

A. He said, "If I'm not hurting you, be quiet."

Q. That's while he was having sex with you?

A. Yes. And I'd keep on crying, and he said, "Now, you don't want to start anything, do you?" And I said, "No," and I started not to cry loud.

Q. Did you at any time scream loud or yell for your husbaand, or something like this?

A. No.

Q. Mrs. Carver, did the man Coker hurt you in any other way physically aside from this alleged sex act that you said he had with you?

A. No.

[T 160] Q. I beg pardon?

A. No, sir.

Q. He didn't twist your arm, or anything did he?

A. Well, when he made me go in the living room he grabbed hold of my arm and he held it tight. I couldn't get loose.

Q. Well, he didn't wrench your arm up behind you or anything like that and put you in terrible pain, did he? He was trying to control where you walked, but he wasn't actually hurting you when he did that, was he?

A. Well, it hurt a little when he snatched it hard.

Q. But he wasn't doing it hard enough, you know, like he was holding your arm up behind you or anything like that?

A. No. He had down on the front.

Q. He was just holding you by the back of your arm, wasn't he?

A. Yes.

Q. Now, did he do any other thing physical to you?

A. Not that I remember.

Q. Well, you would remember if he had hurt you in any other way, wouldn't you?

A. Yes.

Q. All right, now, did he do anything physical to your husband other than leave him tied up?

A. No, sir.

Q. Did he do anything physically hurtful to the baby?

A. No.

Q. How is the baby now?

A. He's okay.

Q. How old is the baby now?

A. About three months old.

Q. Have you completely recovered physically yourself?

A. Now?

[T 161] Q. Yes.

A. Yes, sir.

Q. Now, you said that after you left the house you got in the first time—when you left the house the first time you got in the driver's side of the car?

A. Yes.

Q. Did he make you get in on that side or did you go to that side?

A. Well, at first I thiught he wanted me to get in on the other side and I started walking around there and he started pushing me the other way, and he said, "No, you'll have to get in on the same side."

Q. Have to get in on the same side?

A. Yes.

Q. All right, what did you do when you got in?

A. When I got in I started to get as far to the other side as I could and he pulled me back over there and said I'd have to set by him. He asked me how to crank the car and I showed him how to crank it.

Q. Did he put his arms around your neck or anything like that?

A. Not then.

Q. At any time during the ride?

A. Not while he was driving, or anything, but when he was parked out there close to Millwood he did.

Q. He did put his arm around you then?

A. Yes.

Q. Well, was he more or less hugging you and embracing

you at that time or was he putting you in a headlock to hold you?

A. No. He put one of his arms around me and he started to unbuttoning my blouse.

Q. He wasn't hurting you with that arm he had around you, was he?

[T 162] A. No.

Q. Now, you said he cranked the car and then turned it back off and said, "We're going to go back inside and check on your husband"?

A. Yes.

Q. Now, did he, in fact, check on your husband?

A. Sir?

Q. Did he check on your husband?

A. Yes.

Q. Did he say anything about checking to see if he was all right?

A. No. He just went in there and he looked at him and he started telling him what was going to happen if a police car or anything stopped him—stopped him or anything, and told him that he was going to put me out in Waresboro.

Q. All right, you said he told him what was going to happen if a police car stopped him?

A. Yes.

Q. And that he was going to put you out in Waresboro?

A. Yes, he said he would tie me up and put me out at that station there.

Q. Mrs. Carver, did he bend over and look at the baby while he was there?

A. I don't think he did. He'd look at him once in a while, but that's about it. He looked to see if he was still asleep or something.

Q. Was the baby asleep the whole time this was happening?

A. Yes.

Q. Did he look at the baby when you all went back in the car—went back in the house?

A. I don't think so. He started telling Allen everything that was [T 163] going to happen.

Q. Now, he told your husband what he would do to you if the police showed up and stopped him? Is that right?

A. Yes.

Q. Now, did he have the knife in his hand at that time?

A. I think he'd put it in his pocket. Of course, he had both of his hands on my arms.

Q. He had both of his hands on your arms?

A. Yes.

Q. Did he at any time hold the knife up to you and threaten you with it?

A. Not when we started to leave.

Q. Not when you started to leave?

A. No.

Q. So, you all went back and got in the car, and I think you related how you drove around, and then finally you got out past Waresboro to the cut off going to Douglas or to Tifton—Pearson, rather, and did he go straight or turn left?

A. He went straight on going towards Millwood.

Q. And sometime after that he found a road and turned off to the left?

A. Yes.

Q. Now, did a car pass you all at any time?

A. Yes, but I didn't notice what kind of car it was, though.

Q. Did he ask you about that car?

A. No.

Q. Well, when did he ask you was that a police car?

A. He asked that when we were going, and he asked me where was a dirt road to turn off, and he said he saw a car stopped up there and he said he thought it was a road block, or police car, and he asked me where a road was, and I told him that [T 164] there road to turn off.

Q. And the car he saw up ahead he thought might be a police car, and he asked you was that a police car?

A. Yes.

Q. So, then you all turned off and went down the road?

A. Yes.

Q. Now, where was the knife at this time?

A. Up in the sun visor of the car.

Q. Then he went down this road a half a mile or so and it dead ended and then he turned the car around and parked it like he was going out? Is that correct?

A. I don't think it was half a mile.

Q. Well, wherever it was, he drove down to the end of the road and then turned the car around and parked it?

A. Yes.

Q. And was headed back up the road?
A. Yes.
Q. And that's when you all sat there for thirty minutes or so?
A. Probably about fifty-five minutes. Close to an hour.
Q. Close to an hour?
A. Yes.
Q. And then a car came up?
A. Yes.
Q. Now, what did that car do?
A. That car turned in that dirt road and it come up there.
Q. Did you see the car when it turned in on the dirt road?
A. Yes.
Q. How far up there was it?
A. It wasn't far.
Q. It was turning off the main highway, wasn't it?
[T 165] A. Yes.
Q. And the dirt road was more or less straight down to where you all parked, wasn't it?
A. Yes.
Q. And, did he see the car when it turned off the road?
A. Yes.
Q. Now, where was the knife when he turned off the road?
A. It was up in the sun visor of the car.
Q. The car then came down and parked in front of you?
A. Yes.
Q. How far in front of you was it?
A. Probably about two car lengths.
Q. Fifteen or twenty feet, or something like that?
A. I think so.
Q. Now, I think you said shortly after that first car got there a second car came up?
A. It was more than one car.
Q. Several cars?
A. Yes.
Q. And they pulled up, and they pull up closer than that first car, or what did they do?
A. I didn't notice how close they pulled up. I just know they stopped and everybody got out of the cars and started coming up to the car where we were.
Q. Now, where was the knife when the second car came up?

A. Up on the sun visor.
Q. Where was the knife when the third car pulled up?
A. On the sun visor.
Q. Now, do you think this man had any idea these were police cars pulling up?
[T 166] A. Yes. When the first one come up there he said—he said something about it must be the police, and then he said, "Maybe it's somebody coming out there to park or something."
Q. But, he said it might be the police?
A. Yes.
Q. Did he threaten you with the knife at that time?
A. No.
Q. When the second car came up did he say anything about it being a police car?
A. No.
Q. Did he threaten you with a knife at that time?
A. No, sir.
Q. As a matter of fact, then, Mrs. Carver, he just didn't plain carry through with the threat that he gave to your husband? Isn't that so?
A. Yes, sir.
Q. Mrs. Carver, did you see the police or the sheriff, or whoever it was, actually search the man when they got him out of the car?
A. I know they took him back to the back and I saw them putting their hands on his sides and everything like this and they were checking him and they put handcuffs on him.
Q. You saw them putting their hands on his sides and kind of running them down his legs, or something like that and going over his pockets?
A. Yes, sir.

MR. BENNETT: I believe that's all.

REDIRECT EXAMINATION

Q. (BY MR. HAYES) Mrs. Carver, he was asking about the time when all the law enforcement officers came up—they probably came [T 167] up so fast the defendant could hardly breathe, didn't they?

A. Yes, they come in fast, but they stopped before they got in front of his car.

Q. Who was your doctor in the hospital?

A. Dr. George Heath.

(Witness excused)

(Whereupon, at 5:04 o'clock, P. M., November 20, 1974, an adjournment was taken.)

[T 168] (After adjournment)

November 21, 1974.

THE COURT: You may proceed.

MRS ELNITA CARVER was thereupon recalled as a witness for recross examination in behalf of the defendant, and testified as follows:

RECROSS EXAMINATION

Q. (BY MR. BENNETT) Mrs. Carver, did you talk to Coker in the car at all about the fact that he made you miss supper?

A. I don't think so.

Q. I don't believe the jury can hear you. You say you did not?

A. No.

Q. Did you at any time laugh and joke with him in the car?

A. No. I just asked him what time was he going to put me out.

Q. Did you laugh when you said that?

A. No.

A JUROR: Your Honor, I didn't hear the first question.

THE COURT: Ask it again.

Q. (BY MR. BENNETT) Was anything said by you to the defendant here to the effect that he made you miss supper that night?

A. Did I say anything?

Q. Yes. Did you say anything like that or to that effect?

A. No. He said something or other about us cooking supper and I just said it burned up.

Q. Now, you testified yesterday that when you first got in the car the second time to drive away he told you to sit

next to him?

A. Yes, sir.

Q. Now, at any time after that would it have been possible for you to have moved over, say, a few feet away from him?

[T 169] A. No.

Q. Was he restraining you over there?

A. No. He just told me to stay there by him.

Q. But he didn't physically pull you over there, or anything like that?

A. What do you mean by that?

Q. Well, I mean he didn't put his arm around you, or did he put his arm around you and hold you in place close to him?

A. No. He said for me not to move.

MR. BENNETT: All right, that's all.

(Witness excused)

DR. GEORGE S. HEATH was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) Will you state your name for the record, Doctor?

A. My name is Dr. George Seaborn Heath.

Q. From what medical college did you graduate, Dr. Heath?

A. Medical College of Georgia.

Q. When?

A. 1969.

Q. What have you been doing since that time, Dr. Heath?

A. I interned at Memorial Medical Center in Savannah the following year, and since that time I've been in private practice in Waycross, Georgia.

Q. I bring your attention particularly back to the night of September 2 or the early morning of September 3 concerning Mrs. Carver.

[T 170] A. Yes.

Q. Did you have occasion to see Mrs. Carver?

A. Yes. I was called in the early morning hours around five o'clock, I believe, to examine Mrs. Carver.

Q. And, where did you see her, Dr. Heath?

A. In the emergency room at Memorial Hospital here in Waycross.

Q. Did you examine her, Dr. Heath?

A. Yes, I did.

Q. Did you examine her in the genital area?

A. Yes, I did.

Q. Would you just tell the jury what you found?

A. This lady was an obviously scared young woman. She seemed to be quite tender in the pubic area. There was some slight moderate swelling in the area of the vagina; tenderness to examination. This was more than normal, but not extreme. There was a very slight amount of blood on examination. I did not see a site of bleeding. That is, I did not see a specific area. I took a blood smear—some of the secretion and fluid from this area and put it in a saline solution to keep it and examine it under the microscope, and found a large amount of red blood cells, occasional white cells, and there were occasional human sperm present.

Q. Was that consistent with the girl being raped?

A. It was consistent with that.

MR. BENNETT: If it please the Court, I think this calls for a conclusion of the doctor.

THE COURT: I sustain the objection.

Q. (BY MR. HAYES) Doctor, let me ask you—

THE COURT: (Interposing) Let me instruct the jury that that opinion which I have ruled out is not a proper opinion [T 171] in this case. That is solely a matter for this jury to determine, and I instruct you to disregard the conclusion just stated by the doctor.

Q. (BY MR. HAYES) Doctor, let me ask you this: You have just stated that you examined the vagina of this young lady and that you found sperm in her private part? Is that right?

A. That is correct.

Q. In every day language, is that the result of a man having relations—this sperm being present?

A. In every day language, yes.

Q. In other words, for a man to discharge in a woman? That's what it is, isn't it?

A. That is prima facie evidence of that, yes.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Doctor, you don't know anything about the source of the sperm, do you?

A. I have no way of knowing where it came from.

Q. That sperm could just as easily have come from her husband as any other person? Isn't that right, Doctor?

A. I cannot verify the source of it.

Q. And you said there was a slight amount of blood?

A. Yes.

Q. Doctor, would this slight amount of blood have been consistent with her prior pregnancy and delivery?

A. I have no way of really knowing what caused that.

Q. Well, she's testified that she had delivered a child approximately three weeks prior to this, and she's testified that she was still menstruating at the time prior to—well, on that very day she was still menstruating—now, could the [T 172] blood that you found have been menstrual blood or blood discharges as a result of the healing process still undergoing?

A. Yes.

Q. Now, you're not telling the jury, then that the blood that was there was caused by any violent act of intercourse or anything like that?

A. No, sir. I have no way of knowing, really.

THE COURT: Is there anything else for the doctor?

MR. BENNETT: Nothing further.

(Witness excused)

GLENN ROUSE was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) State your name for the record, please.

A. Glenn Rouse.

Q. By whom are you employed, Mr. Rouse?

A. Ware County Sheriff's Department.

Q. Were you so employed back on the 2nd day of September this year?

A. Yes, I was.

Q. Mr. Rouse, were you working on this night?

A. Yes, sir; I was.
Q. September 2nd and September 3rd?
A. Yes, sir.
Q. Did you receive a call from some place, Mr. Rouse?
A. Yes, sir; I did.
Q. Where were you at the time?
A. I was on Nicholls Street.
Q. I don't mean the exact location. Were you on that street in Waycross?
A. Yes, sir; I was.
[T 173] Q. What were you doing at the time, Mr. Rouse?
A. Well, we were in the act of searching for some inmates that escaped the Ware C. I.
Q. About what time did you receive this call? I assume it was on the radio? Is that correct?
A. Yes, sir. Around 1:15.
Q. You say you were on what street at the time?
A. Nicholls Street.
Q. And immediately upon hearing this call what did you do, Mr. Rouse?
A. Well, I proceeded to answer it.
Q. And then you did what? Where did you go?
A. I went out to Mr. Smith's house U. S. 1 North who was calling for another subject.

MR. BENNETT: May it please the Court, we object to him testifying to the contents of the call. He can testify what he did.
THE COURT: Go ahead with the next question.

Q. (BY MR. HAYES) Don't tell what somebody said, but just tell what you did.
A. After I received the call I went to answer it, and, like I say, it was on U. S. 1 North at Mr. Smith's house. I got there and he was standing on the porch and I asked him where the trouble was and he told me—
Q. (Interposing) You can't tell what he told you. You talked with Mr. Smith?
A. Yes, sir; I talked with Mr. Smith.
Q. And after you talked with him what did you do?
A. I turned around and went to the house, which was in front of him. It was behind me. And I saw a young white male walking [T 174] towards the house.

Q. Do you know who that male was?
A. At that time I didn't.
Q. Do you know now?
A. Yes, sir; I do.
Q. Who was it?
A. Allen Carver.
Q. Did you talk to him, Mr. Rouse?
A. At the time I got to the house he had already entered the house, a little small house, and the back door was open and I went right on in and I met him in the bedroom, and he had a little baby in his arms, and I could tell he was pretty well shook up, and so I sit him down in a chair and tried to talk to him.
Q. Mr. Rouse, did you go in the house yourself?
A. Yes, sir; I did.
Q. Did you observe the house?
A. Yes, sir.
Q. Are you familiar with it?
A. Yes, sir.

MR. HAYES: Would you mark this for an exhibit, please?

(The sketch referred to was thereupon marked for identification "S-11.")

Q. Mr. Rouse, would you look at that and see if you recognize the general outlay of the house on the inside.
A. Yes, sir; to the best of my knowledge, that's the way it looked.

MR. BENNETT: May it please the Court, I don't think that is sufficient foundation for that.
[T 175] MR. HAYES: We will lay more foundation.

Q. Do you recognize where the doors are and the approximate size and so on?
A. Yes. I recognize it.
Q. Do you recognize it now as being a correct representation generally speaking of the house?

MR. BENNETT: May it please the Court, I think he is leading the witness and we object to it.

Q. (BY MR. HAYES) Mr. Rouse, what's your answer to it?
A. Yes, sir; it's a drawing of the house—it looks like it.

MR. BENNETT: Your Honor, we've objected to leading questions.

THE COURT: I'll let him go ahead.

Q. (BY MR. HAYES) Mr. Rouse, would you tell us the size of the house?

A. It's a rather small house. It had two rooms—two large rooms and a bath room.

Q. Could you look at that and tell us how many feet it is across the front of the house?

MR. BENNETT: Now, if it please the Court, we object to the witness testifying from this exhibit until it's admitted in evidence, unless he's able to testify that he made these measurements himself and can testify of his own knowledge as to what the dimensions are.

THE COURT: Are you planning on introducing this in evidence, Mr. Hayes?

MR. HAYES: Well, we planned on it, but we can identify it. We didn't think he'd have any objection to it, really.

THE COURT: Well, he does object to it.

Q. (BY MR. HAYES) Mr. Rouse, you say this house is what size, [T 176] from having looked at it?

A. Like I say, it was a rather small house. It had two large rooms and a bath room. I think the kitchen and dining room and kitchen were combined, and the other room was the bed room, and had a little bath room built in the corner of it.

Q. They had two rooms in the house with a bath room?

A. That is correct.

Q. And when you got in the house what did you see, Mr. Rouse?

A. Like I say, I went on in the back door, and Mr. Carver had already entered before I got there. I went on in the back door and I could see through it, and I met him at the bed with the baby coming back toward me in his arms, and, like I told you, I could tell he was pretty well shook up, so I sit him down in a chair and started questioning him.

Q. Now, after you talked with Mr. Carver what did you begin doing, Mr. Rouse?

A. After I got the information from him that I thought we needed I went out the back door, and by that time the Sheriff had already arrived at the scene and I hollered at him and gave him the information I got from Carver.

Q. Just tell what you told the Sheriff. Not what was told you, but tell the jury what you told the Sheriff.

A. I hollered out the back door at the sheriff and told him that the subject had been here——

MR. BENNETT: (Interposing) May it please the Court, we object to a statement made out of the presence of the defendant and out of court. It is hearsay.

THE COURT: Overruled.

Q. (BY MR. HAYES) Go ahead, Mr. Rouse.

A. That one of the subjects had been here and he had taken this boy's wife and they believed headed towards Atlanta in a '63 [T 177] white Chrysler—'63 or '64. I don't remember exact. One of the two—a '63 or '64 white Chrysler; and he put it out over the radio right there that the boy was believed headed towards Atlanta out 82.

Q. You passed the information on to him?

A. Yes, sir; I hollered out to him from the back door.

Q. What did you do following that, Mr. Rouse?

A. After that I went back to the boy and tried to talk to him some more, and——

Q. Now, don't tell what he said. Just tell what you said and what you did.

A. I asked him if he had the tag number and all that, and, of course, I didn't get the tag number, or nothing; so, about that time the sheriff, he left, and put it out over the radio what description I gave him earlier, and, so, about that time Deputy Dunsmore came up and I left him in charge of Mr. Carver, and, so, I left behind the sheriff trying to overtake the car.

Q. Did you later locate the white Chrysler that you were looking for?

A. No, sir; I—the sheriff was ahead of me and he went all the way up 82 and I went up 82 to 158, and I went up 158, and I received a call from him that he had run up on them.

MR. BENNETT: Objection to what he told him.

THE COURT: Sustained.

Q. (BY MR. HAYES) Don't tell what somebody said, but did you receive a radio call? If so, tell who you received it from.

A. From the sheriff.

Q. You're talking about Sheriff Strickland?
A. Yes, sir.
Q. All right, after you received this radio call from Sheriff Strickland tell the jury what you did.
[T 178] A. I immediately tried to turn around and my car tore up when I was trying to turn around. It ran hot, and, so, I had to wait for another unit to come by and pick me up and take me over there.
Q. Where did he take you?
A. He took me up 82 around the Fairfax community up there.
Q. What did you find there?
A. I talked with the sheriff up there——
Q. (Interposing). Now, don't tell what the sheriff said.
A. And we decided——

MR. BENNETT: (Interposing). We object to what "we decided".

Q. (By MR. HAYES): Tell what you did. Tell the jury what you said and what you did.
A. I told the sheriff that I would ride the side road and see if I could locate the car.
Q. Did you do that?
A. Yes, sir; I did.
Q. Did you locate it?
A. No, sir; I was unable to locate it.
Q. Did you ever see it that night?
A. Yes, sir; I saw it later on that night.
Q. Where?
A. It was setting side the highway.
Q. Where?
A. In the Fairfax community.
Q. Do you know who were the first officers there?
A. To the best of my knowledge, it was Deputy Dunsmore, Ammons, and the sheriff and his boys. They got there about the same time.
Q. Mr. Rouse, if you can think, did you give out anything else [T 179] in your report?

MR. BENNETT: Now, if it please the Court, I think that is improper leading of the witness.
THE COURT: Don't lead your witness, Mr. Hayes.

Q. (BY MR. HAYES) Mr. Rouse, let me ask you this: Did you say anything else, if you can remember?

MR. BENNETT: Your Honor, that's the same question again, and we object to it. He's leading this witness. He's trying to testify for him.
THE COURT: I think I understood the question, but ask it once more.
MR. HAYES: I asked Mr. Rouse if he could recall anything else that he put out on the radio other than what he's told the jury already.
THE COURT: All right, I will let you ask that. Go ahead. Answer the question if you know, Mr. Witness.

THE WITNESS: Yes, I believe, as I said before, I hollered that back over to the sheriff.
Q. (By MR. HAYES) Tell what you said.
A. And I told the sheriff that one of the subjects had been here and he left; he took the boy's wife, and he left in the car, '63 or '64 white Chrysler, and said he had a knife and was told that if the law was informed to go after him——

MR. BENNETT: (Interposing) Well, we object to that. It would be hearsay from what he was told.
THE COURT: The objection is overruled.

Q. (BY MR. HAYES) Just go ahead with what you put out over the radio. That's all.
A. I told the sheriff that the subject was armed—we usually do that—and he did have a knife with him. And that's about all.

MR. HAYES: You may cross examine.

[T 180] CROSS EXAMINATION

Q. (BY MR. BENNETT) Mr. Rouse, did Mr. Carver give you a description of the man that was in the house?
A. No, sir; he was pretty well shook up.
Q. He could not give you any description?
A. No, sir; I didn't ask him for a description of him.
Q. And he did not give a description of the individual that was in the house?
A. No, sir.
Q. And you didn't know?
A. Only except that he was a white male.
Q. That's the only description you had?

A. Yes, sir.

Q. Now, Officer Rouse, when you got out to the Smith house how many other sheriff's deputies were in the area?

A. How many were out there?

Q. Yes, sir.

A. When I arrived there was nobody there but me.

Q. Was your car the only deputy's car there or sheriff's car there?

A. Yes, sir. I was the first one there.

Q. So, it would have been impossible, then, for there to have been a bunch of deputies and policemen at the Carver home when Mr. Carver arrived there?

A. You mean——

Q. (Interposing) I will ask another question: What, if any, deputies or policemen were at the Carver home when you got there?

A. No, sir. Like I say, I was the first one there. There was nobody there but me.

Q. When you got there he was already there?

A. Yes, sir; he was going in the back door.

[T 181] Q. Now, you first told the jury it was a '63 white Chrysler, didn't you?

A. Yes, sir; '63 or '64 I believe the report has got it.

Q. And this was the report you made at the time?

A. I helped the officer make it.

Q. And it was based on your recollection at that time as to what kind of car it was?

A. Yes.

Q. What does your report show the car was?

A. I got a '63 white Chrysler.

MR. BENNETT: That's all.

(Witness excused)

W. E. STRICKLAND was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) State your name for the record.

A. Sheriff W. E. Strickland.

Q. Sheriff Strickland, were you sheriff all this year?

A. Yes, sir.

Q. Sheriff, were you on duty back on September 2 and September 3 this year?

A. Yes, sir; I was.

Q. Do you know this defendant Coker in this case?

A. Yes, sir; I do.

Q. Have you seen him before?

A. Not until this night on the morning of——

Q. (Interposing) I mean before this time. Before now.

A. Before this incident?

Q. Yes.

[T 182] A. I'd never seen him before.

Q. Did you have an occasion to see him on the night of September 2 or on the morning of September 3?

A. On the morning of September 3.

Q. Sheriff, at this time were you looking for the defendant?

A. Yes, sir. We were.

Q. When did you start looking for him? Don't tell what somebody told you

A. We started approximately at nine o'clock or a little after.

Q. So we can get it in the record, are you talking about nine o'clock P.M.?

A. Nine P.M. on the night of 9-2-74.

Q. On September 2 around nine P.M. you started looking for the defendant Coker?

A. He and two others, yes, sir.

Q. After you started looking for him, Sheriff, did you go any other place?

A. Yes, sir; we did. We went several places.

Q. Do you know Allen Carver?

A. Allen Carver is the young man whose wife was assaulted.

Q. Did you have occasion to go to his place?

A. Yes, sir; I did.

Q. When did you go there, Sheriff?

A. Oh, we'd left the railroad yard and I was at the front of the old John King Ford and received a call from the station, calling Glenn Rouse and the units to U.S. No. 1 North to Mr. Smith's house. That was about 1:22 A.M.

Q. Now, where does Mr. Smith live with reference to where Allen Carver lived?

A. Oh, he lived east—Mr. Carver lies east of Mr. Smith,

between Mr. Smith and U. S. No. 1. It's setting about three or four hundred feet east of Mr. Smith's house. It looks to be a little white Jim Walter's house.

Q. Have you been inside that house?

A. No, sir; I have not.

Q. Did you go to Allen Carver's house that night?

A. Yes, sir; I did, but Deputy Rouse arrived just a few seconds—just a minute or so before I did. He was nearer and he arrived and had gone in the house and I was sitting in the car getting information by radio, and it was just a few minutes when Deputy Rouse gave me a description of what we were looking for.

Q. After you talked with Deputy Rouse and got the description what did you do following this, Sheriff?

A. I got on the radio and gave orders for all cars on the hunt to proceed west on U. S. 82, Georgia 158 and Georgia 122 to try to overtake and apprehend a subject driving in a 1963 or '64 white Chrysler with an aerial on the rear, occupied by one white female.

Q. Occupied by who?

A. A white female, and a description of the subject we were looking for, Ehrlich Coker, a white male 24 years of age, five, seven, weighing 140 pounds, blonde hair and blue eyes.

Q. This car was occupied by two people?

A. Yes, sir; a male and female.

Q. Sheriff, did you go out on 82 going west?

A. Yes, sir; I did. I did and overtook the Chrysler on U. S. 82 west beyond the intersection of Georgia 158 and U. S. 82, near Fairfax—the Milwood section.

Q. Sheriff, if I understand you correctly, so we can pin point it, 158 is to Douglas?

A. Yes. 158 is the road to Douglas and U. S. 82 is the Pearson-[T 184] Tifton highway.

Q. So, you proceeded on——

A. West on the Tifton highway.

Q. On 82?

A. Yes, sir.

Q. About how many miles past this intersection was it before you saw this white Chrysler you were looking for?

A. Ask that again, Mr. Hayes.

Q. About how far were you were past this intersection before you saw this Chrysler that fit the description you were looking for?

A. Approximately five miles. Five to six miles, more or less.

Q. What county was that in.

A. Ware County on U. S. 82.

Q. And, Sheriff, when you saw this white Chrysler that fit the description you were looking for were there any people in it?

A. There was a male and female.

Q. Who was driving?

A. The male. The female was sitting right next to him.

Q. When you observed this, Sheriff, what did you do?

A. I passed them in a hurry. Can I go into detail and explain that, sir?

Q. Yes.

A. Well, we were on the look-out and we knew they had been gone several minutes ahead of us. Well, I gave orders for the cars to leave, other than the ones that we left at the scene at that particular time at the Carver house. Well, I was running at a high rate of speed and we were in a long curve, where the jury that's familiar with the old K. S. Varn farm on U. S. 82—some of them call it the Television Road—where a long curve is. I met him just at the west end of the curve and ran up on him before I knew it. Well, I had to think in a hurry what was [T 185] the best because we were advised that he was armed with a knife and he had nothing to lose and he would kill her, so I immediately passed him and got ahead of him and I picked up the radio and radioed back for the back-up units to come in and close in. I continued west—I didn't want to slow down right there, and I got on past Benny Hill's and the Silas Douglas farm into the old Pruett section up there with the hills—rolling hills, so I went over the second hill and I looked back and the lights had disappeared on us. I immediately turned around and went back to where I thought I last saw him and went back to the first cross road, and there were three colored subjects hitch-hiking to Pearson, and in the meantime I called for the State Patrol and all of our units to come 1018, which is in a hurry—that I'd lost him, and I gave orders to call Douglas, Pearson, Homerville and set up road blocks in all areas, so they came to me, and Sergeant Brown and myself started riding on other roads back to see where they could have turned off. Well, they were setting up road blocks, and I went back to

the approximate distance after that first cross road that I lost him. Deputy Dunsmore and Charles Ammons came to me and I gave them orders that we would ride out all three-path roads and all roads in the vicinity to see if we could come up with anything. I had just got through riding a road out to my left traveling west when I received a call by radio to come, that he had located the car, from Dunsmore. I wasn't over twenty-five feet——

MR. BENNETT: (Interposing) May it please the Court, we object to what he received from Dunsmore.

THE COURT: That's hearsay.

THE WITNESS: Well, I proceeded——

MR. BENNETT: (Interposing) Will you tell the jury to [T 186] disregard that?

THE COURT: The jury will disregard anything that was told him. That would be hearsay and not competent evidence.

Q. (BY MR. HAYES) Sheriff, let me explain this to you: Don't say what was told to you. Did you receive a radio call?

A. I did, sir.

Q. Who was that from?

A. Deputy Dunsmore.

Q. And after you received this radio call what did you do?

A. I went to the location where he was, which was approximately a half a mile.

Q. And when you got there what did you find, Sheriff?

A. I found that he was approximately two car lengths south of the car that we were looking for with the lights shining on him, and I pulled off past him on the left side, and there were two trees there, and just as soon as I stopped my two sons, which are deputy sheriffs, Henry and Jimmy Strickland, jumped out of the car, and then they and Charley Ammons and Dunsmore ran up and they got him out of the car with this young lady and picked him up and just gave him a frisk. Instead of taking stuff out of his pockets we were looking for a knife, and they just frisked him down, and I handcuffed him and advised him of his rights, and he was placed in the back of the deputy car that has a screen, and I asked the young lady if she was hurt, and she advised nothing other——

Q. (Interposing) Don't go into that. Go ahead.

A. And then I gave orders for Deputy Charles Ammons to get in the car with Mrs. Carver and drive her to the jail, where she was turned over to Captain J. E. Hurrhee and Sergeant Harry Watts and Bill Hatchett, with the Georgia Burean of Investigation.

[T 187] Q. Sheriff, when you located this white Chrysler, do you know whose Chrysler that was?

A. Other than hearsay that it belonged to——

Q. (Interposing) Don't tell that. Did you look in the Chrysler, Sheriff?

A. Other than hearsay that it belonged to——

Q. (Interposing) Don't tell that. Did you look in the Chrysler, Sheriff?

A. Yes, sir; I did, and found a knife with a clothes pin on the tip of it, and you will see "W.S", as my initials, "Ware Sheriff," or you can make it "William Strickland".

Q. Sheriff, will you look at State's Exhibit No. 2?

A. That is it. "Ware Sheriff" or "William Strickland," either one you want to make it.

Q. Sheriff, where did you first see State's Exhibit No. 2?

A. Over the sun visor of the Chrysler on the driver's side; and it had a white clothes pin on it, and it's got my initials "W.E.S", I believe, on the clothes pin.

Q. Sheriff, do you see that clothes pin?

A. No, sir; not up here.

Q. Sheriff, you said that when you looked in this Chrysler the one that Coker was arrested in that you saw a knife, and what, now?

A. A knife with the clothes pin on the end of it, just like this here.

Q. And whereabouts in the car was it?

A. Over the sun visor on the driver's side. I asked the little lady where it was because we couldn't find it on him. That's why we frisked him down—for a knife. He had a white aluminum comb and some other stuff, but there was no knife and no gun.

Q. You say you found that yourself?

A. Yes, sir.

[T 188] Q. Over the sun visor in the car?

A. Yes, sir.

Q. Will you just describe that knife very briefly, Sheriff?

A. Well, it's approximately a four inch blade and a four inch handle. It's a steak knife. It's a plastic handle and it looks like a stainless steel blade.

Q. Would that knife be an offensive weapon?

A. I would say so.

Q. Is it something you could kill somebody with?

A. Yes, sir; it could.

Q. Sheriff, what did you do with the knife and the clothes pin?

A. I turned it over to GBI Agent Bill Hatchett.

Q. Is it in the same condition it was then?

A. Same condition. Same condition as when I turned it over to Agent Bill Hatchett.

MR. HAYES: You may cross examine.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Sheriff, you said that knife is a dangerous weapon?

A. Absolutely. I presume it is. Anything that will produce death is dangerous.

Q. That knife would?

A. Yes, sir; it certainly would.

Q. But in this case it wasn't used at all?

A. No, sir.

Q. How long did you say the deputies had this white Chrysler under observation before you got there?

A. Just a matter of a few seconds, Mr. Bennett. It's a half a tenth of a mile, and I was turning off the road till I could get there.

[T 189] Q. Was it two or three minutes, maybe?

A. Oh, no. No, sir; not at the speed that I was running. It was a half a minute—thirty seconds, or a minute. I will leave it that much leeway.

Q. I thought you said you were a couple of miles away.

A. No, sir; I was about twenty-five yards from the turn-off, or twenty-five feet from the turn-off.

Q. It was a half a mile or so?

A. Back east to where they turned off.

Q. At the time you got that telephone call—I mean radio call——

A. I was turning off of U. S. 82 to the old Silas Douglas farm road, which dead ends at the house and there were

several cars there, and an old house and several pecan trees and oak grove to the right and a corn field behind.

Q. Now, the first to get there, that was——

A. That was Deputy Dunsmore and an Alma driver.

Q. Now, was this clearly marked as a sheriff's car.

A. Yes, sir; but you could not detect that with the light shining to you, because it was on the sides and the rear and not the front.

Q. What about on top?

A. It's got a light, yes, sir; it's got a light.

Q. Does it have a light all the way across the top?

A. No, sir; not this one. It's got one light in the middle. It's a 1970 green and white Pontiac.

Q. So, there was a revolving——

A. (Interposing) Light on the top, yes.

Q. Now, what about lights on the hood—grill?

A. No, sir. The only ones that's got them is Captain Murrhee and Chief Cady and myself that's got them in the grill. The rest of them are on the top.

[T 190] Q. So, the only marking would have been——

A. (Interposing The dome light—not the dome light, but the blue light on top.

Q. Well, you heard the testimony yesterday, did you not?

A. Yes, sir.

Q. That Mrs. Carver said——

A. (Interposing) Yes, said it possibly could have been a police car or some lovers, and I doubt this, being fair to you and your client, that from the glaring headlights in their face, that they could see one. I don't know whether they could. I'm not saying whether they could or couldn't.

Q. Well, in being fair to me and my client, would you say he possibly knew that was a police car?

A. I wouldn't say yes or no, because he knew that we were looking. He knew we were in the vicinity because I passed him.

Q. Sheriff, during the time he was in the car with her under observation by your deputies, the first to arrive, did he have time to use that knife?

A. He could have from the time that we got the message to the time that we rode up, he didn't have very much time. He would have been mighty foolish to use it, Mr. Bennett.

Q. Well, I understand that, but he had ample opportunity?

A. Yes, sir; he did.

Q. And he had sufficient time to use it?

A. Yes, sir; but you understand why I didn't stop him the first time because we've got to look at he had nothing to lose, and I had to think fast what to do for the best for the girl.

Q. I understand that. He didn't have anything to lose when you were sitting right there looking right at him?

A. That's rights. There's lots of difference when you're facing cold steel, though, Mr. Bennett.

[T 191] Q. Was a deputy or policeman close to him at that time?

A. He was about two car lengths away.

Q. Well, wasn't he sitting in that car by that girl?

A. Yes, sir; he was sitting there with his arm around her.

Q. You said you turned that knife over to GBI Agent Bill Hatchett?

A. Yes, sir; I did.

Q. And he will testify as to the custody of the knife?

A. I don't know, sir. He probably will if they call him. He's here to testify.

Q. Now, what kind of car did Officer Rouse tell you you were looking for?

A. Mr. Bennett, there was confusion. I have a '63 Chrysler—his is a New Yorker, mine is a Newport, and from the back you cannot tell them apart. He told me it was a '63 or '64.

Q. What did you write down on your report?

A. Here it is, Mr. Bennett.

Q. Well, tell me.

A. It was given out by the radio station here as a 19—"Be on the lookout for a white '64 Chrysler occupied by a white male and a white female."

Q. Where did that come from?

A. That came from the Ware County Sheriff's office, that Mr. Rouse—I was there and gave it to him from the scene.

Q. Well, you heard Mr. House testify that his report showed?'63?

A. '63 or '64.

Q. He said his report showed '63, didn't he?

A. Well, I heard him say it was '63 or '64.

Q. But didn't he say his reported showed a '63 Chrysler?

A. I wasn't clear on that. He said——

[T 192] THE COURT: (Interposing Just a minute. What are we doing here now? You're arguing about what one witness said and what another witness said. Let's go on. If you want to question this witness, question this witness.

MR. BENNETT: I was under the impression that we were entitled to a thorough and sifting cross examination.

THE COURT: What I'm stopping you from doing is comparing what this witness said with what another witness said, and you're getting into an argument of whether this witness said this or that witness said that. If there is anything you want to ask this witness you may ask him that's pertaining to this case. Let's proceed.

Q. (BY MR. BENNETT) Sheriff, when you got the young lady out of the car was there any evidence that she had been assaulted with a knife?

A. No. The only thing, she was in a partial state of shock. She was highly nervous?

Q. Scared?

A. Yes, sir; she was scared.

Q. She didn't appear to be hurt in any way?

A. No, sir.

MR. BENNETT: That's all.

(Witness excused)

WILLIAM M. HATCHETT was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) State your name for the record, please.

A. WILLIAM M. HATCHETT.

[T 193] Q. By whom are you employed, Mr. Hatchett?

A. The Georgia Bureau of Investigation.

Q. Mr. Hatchett, will you examine State's Exhibit No. 2 in front of you there?

A. Yes, sir.

Q. Will you tell us what it is for the record? And hold it up.

A. It's a steak knife, with a brown handle. Clothes pin attached.

Q. And you say you saw it?
A. Yes, sir.
Q When did you first see it?
A. I saw it the morning of September 3rd, 1974.
Q. Did anyone turn it over to you?
A. Yes, sir.
Q. Who was that?
A. Sheriff Strickland.
Q. Whose custody has it been since that time?
A. Mine.
Q. Is it in the same condition now it was when Sheriff Strickland handed it to you?
A. Yes, sir.

MR. HAYES: At this time we tender it in evidence, and you may cross examine.

MR. BENNETT: No questions.
THE COURT: Call your next witness.

(Witness excused)

HARRY WATTS was thereupon recalled as a witness in behalf of the State, and testified as follows:

DIRECT EXAMINATION

Q. (BY MR. HAYES) So we can get your name back on the record, Sergeant Watts, state your name.
[T 194] A. Harry Watts.
Q. Sergeant Watts, did you make some photographs on this occasion?
A. Yes, sir; I did.
Q. Do you have them with you?
A. Yes, sir; I do.
Q. Sergeant Watts, did you have some sketches drawn under your supervision of this house?
A. You mean under my supervision was I present?
Q. Yes.
A. No, sir; I was not present.
Q. Who made the photographs, Sergeant?
A. Bill Bennett—of the house—the photographs were made by me.

MR. HAYES: Would you mark them for identification purposes, please?

(The package of photographs referred to was thereupon marked for identification "S-12".).

Q. Sergeant, would you examine the contents of State's Exhibit No. 12, please?
A. Yes, sir.
Q. State how many there are.
A. A total amount of 44 photographs.
Q. Forty-four photographs?
A. Yes.
Q. Who made those photographs, Sergeant Watts?
A. I made the majority of them. The others were made in my presence.
Q. Were they made under your supervision?
A. Yes.
[T 195] Q. Who made the others?
A. Corporal Arnie Herrin and Captain J. E. Murrhee made some of the night of the——
Q. Were you present when they were made?
A. Yes, sir.
Q. Are these true and correct representations of the scene at the time?
A. Yes, sir; they are.
Q. And when were they made?
A. All of these small colored photographs were made the 3rd of September.
Q. Who took those?
A. I did.
Q. All right?
A. All of these——
Q. You took how many, now? Which ones?
A. All of these small color photographs; all of these except for four.
Q. Pull out the ones you didn't take.
A. All right.
Q. I just want the ones you took. How many photographs did you take, now, Sergeant?
A. These here.
Q. How many of those?
A. Seventeen black and white color and seventeen color.
Q. Seventeen color and seventeen black and white?
A. Yes, sir.
Q. Sergeant, when did you take the seventeen color photos?

A. The morning of the 3rd of September.
Q. What time of the morning?
A. Probably around 2:30 or 3:00 o'clock.
Q. Now, what about the seventeen black and white photos?
[T 196] When did you take those? What's the date of them?
A. The same morning, around the same time.
Q. You say two or three o'clock in the morning?
A. That's correct.
Q. You're talking about before daylight?
A. Yes, sir.
Q. The seventeen color photos, what are they photographs of?
A. Photographs of the Carver home and articles there in the home.

MR. BENNETT: Your Honor, in the interest of being able to keep up with all these, we think it would be proper to have these identified, each one, as State's Exhibits, because we're going to have to voir dire him on individual pictures, not in groups of seventeen.
THE COURT: All right, identify them.
MR. HAYES: Would you mark them "A, B, C, D", and so on?

(The photographs referred to were thereupon marked for identification "S-a" through "S-z," inclusive, and "S-aa" through "S-qq", inclusive.)

THE COURT: Did you make all these?
THE WITNESS: Yes, sir; I did.
THE COURT: When did you make them?
THE WITNESS: I made them the night that I was called out.
THE COURT: What time.
THE WITNESS: Between two and three o'clock in the morning.
THE COURT: September 3rd, '74?
THE WITNESS: Yes, sir. I was called out about 1:15 or [T 197] 1:20 that morning.

MR. HAYES: And he's testified that's a true and correct representation of the scene.

• • • •

[T 199] Q. (BY MR. HAYES) Sergeant Watts, now, when did you first arrive on the scene at the Carver house?
A. Around 1:30—between 1:25 and 1:30, A.M.
Q. What did you find on the scene at the time you arrived. Sergeant?
A. Deputy Roy Dunsmore was waiting for me and briefed me on what had happened.

MR. BENNETT: We object to a conversation with Roy Dunsmore.
[T 200] THE COURT: Sustained. Go ahead.
MR. HAYES: Just don't tell what he said. He had briefed you?
MR. BENNETT: Briefing him is the same thing as talking to him, and that's what we're objecting to.

Q. (BY MR. HAYES) Go ahead and tell what happened. Don't tell what somebody told you, but you can tell somebody talked to you. Go ahead now, Sergeant.
A. I went inside the house and talked with Allen Carver, who at this time had a small three weeks old child, sitting in a chair in the front portion of the house—the living room. He stated to me——
Q. (Interposing) You can't tell what he told you. You can just say he talked to you, and tell what you did.
A. We started, myself and Agent Hatchett of the GBI started collecting evidence and taking photographs of the home.
Q. What evidence did you find where?
A. Items that were used to tie the victim's hands and feet were found in the bath room around the bottom of the toilet and around the sink.
Q. Now, I show you State's Exhibit No. 5. Will you examine that, please, sir?
A. Yes, sir.
Q. Is that what you were referring to—State's Exhibit No. 5?
A. Yes, sir; it is.
Q. Did you also find that? And did you photograph that?
A. Yes, sir. I did.

THE COURT: Identify which photograph it is, now.
[T 201] Q. (BY MR. HAYES) Which photograph is it?
A. This one (indicating). Here's two photographs——
Q. Give the numbers.

A. "h" and "g."

Q. All right, sir, just lay them down. What else did you recover from the house?

A. Bed sheet from the victim's bed.

Q. Did you photograph that?

A. Yes, sir.

Q. Would you examine this photograph, please, sir?

A. State's Exhibit "e" is a photograph of the bed sheet on the bed. Also this is another photograph closer.

Q. What is that number?

A. A "b"—it looked like "b."

Q. All right, what else?

A. There was a pair of lady's panties used to gag the victim's husband's mouth.

Q. Now, I hand you State's Exhibit No. 3.

A. This is the panties.

Q. Did you photograph that?

A. Yes, sir; I did.

Q. I will hand you this photograph, and see if you recognize that.

A. State's Exhibit "c"—this is the photograph of the panties.

Q. What else did you find?

A. One 1 inch by 2 inch by 35 inches long piece of wood used as a weapon.

Q. Would you look at State's Exhibit No. 4, please, sir?

A. This is the piece of wood that was used.

Q. Did you photograph that?

A. Yes, sir; I did.

[T 202] Q. Now, let me ask you about State's Exhibit No. 4—whose possession has it been in since that time?

A. It's been in my possession.

Q. What about the panties?

A. They have been in my possession.

Q. What about the other clothing that you testified about —whose possession has it been in?

A. In mine.

Q. Is it in the same condition now as it was at the time you got it at the scene?

A. Yes, sir.

Q. All right, what else did you find on the scene?

A. There were also cigarette butts that were taken from an ash tray in the living room.

MR. HAYES: Will you mark this for identification, please?

(The envelope referred to was thereupon marked for identification "S-13.")

Q. Now, would you look at State's Exhibit No. 13 and tell me if you know what that is?

A. Yes, sir; I do.

Q. Tell the jury what it is.

A. It's the cigarette butts that were taken from the ash tray in the living room on the coffee table.

Q. Whose possession has that been in since you found it?

A. It's been in mine.

Q. Is it in the same condition?

A. Yes, sir; it is.

Q. All right, what else did you find on the scene?

A. One T-shirt, a pair of trousers, a pair of sox.

Q. Now, would you look at State's Exhibit No. 10, please, sir?

[T 203] A. This is the same.

Q. Would you hold it up so the jury can see what you're looking at?

A. A white T-shirt, a pair of white trousers with a blue stripe, and a pair of sox, with "No. 71" on them.

Q. Do the pants have a number of them?

A. Yes, sir; all three. The pants has "No. 71" here (indicating). The sox "No. 71" here (indicating).

Q. Have you had experience as a law enforcement officer as to what that No. 71 indicates?

MR. BENNETT: Objection. That calls for a conclusion that the jury is called upon to make.

THE COURT: Overruled.

Q. (BY MR. HAYES) Do you know what that number is?

A. It's a laundry mark that's given to an inmate. It was a laundry mark that was given to Ehrlich Coker, Ware Correctional Institute.

Q. What else did you find?

A. At the house I did not recover these. There were recovered after he was arrested at our office.

Q. Did you recover them from him?

A. Yes, sir; I did.

Q. Tell us what that is?

A. This is a pair of boxer shorts Ehrlich Coker had on.

Q. And when did you recover those from him?

A. I recovered these after he was arrested and brought to the Sheriff's office before he was locked up. They also had the number "71" in them. They also have his name inside the band on the back side in red.

Q. You say those were recovered in the jail here?

A. Yes, sir.

Q. Do you have anything further?

[T 204] A. I also have a photograph of the articles.

Q. Are those photographs true and correct representations of them?

A. Yes, sir; they are.

Q. Have all those articles referred to been in your possession, custody and control since that time?

A. The articles were turned over to the Crime Lab.

Q. Is that Dr. Sullenger, who was here?

A. Yes, sir; that's correct.

Q. Is is in the same condition now it was then?

A. Yes, sir; it is.

MR. HAYES: You may cross examine.

THE COURT: Are these being offered into evidence now?

MR. HAYES: Yes, sir.

MR. BENNETT: Does that include the photographs?

MR. HAYES: Yes, it includes everything.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Now, Mr. Watts, what is this picture of?

A. This is a picture of the bath room in the Carver home. It shows the toilet and the bassinet which the baby was in.

Q. Did you all see the baby in the bassinet?

A. No, I did not.

Q. You're just assuming that's the bassinet it was in, aren't you?

A. That's what I was told, the baby was in the bassinet.

Q. You never saw the baby in the bassinet?

A. No, I didn't.

Q. Then, what else is it?

A. It shows the articles—items—that were used to tie up the victims' husband's hands and his feet.

Q. Well, now, what are they?

A. There was a towel, part of a pair of panty hose, a bra, [T 205] and some other white garment.

Q. Those are the items that have been identified as such in court?

A. That's correct.

Q. All right. Now, when you got there the baby was not in the the bassinet?

A. No. The bassinet was just like it is sitting there.

Q. Did the baby appear to be all right when you got there?

A. Yes, it appeared to be.

Q. And this picture was taken on September 3rd by you?

A. That's correct.

Q. Was any other officer present with you when it was taken?

A. Yes, sir; there was.

Q. Who?

A. Agent Bill Hatchett of the GBI.

Q. Is he the only one, or were there any others?

A. I don't recollect. Corporal Arnie Herrin might have been, but, like I said, I don't recollect. I know Agent Bill Hatchett was there.

Q. Now, "g" is a close-up of the items found under the commode?

A. That's right.

Q. When you took picture "h" what were you taking it to show?

A. Is this "h"?

Q. No, this is "g." When you took the one we just looked at what were you taking it to show?

A. I was showing the scene where the husband had been tied down and the items that were used to tie him with, before I removed any of the articles.

Q. Now, referring to Exhibit "b"—what is this picture taken to show?

A. This is a picture of the bed, the sheet, the clothing that had been thrown around in the room.

Q. Are you saying this is the clothing you found in the room?

[T 206] A. This only shows a small portion of the clothing I found that I did recover.

Q. That was found in the room?

A. That's correct. The dresser drawers had been ransacked through.

Q. Well, now, you're just stating a conclusion there, aren't you?

A. The drawers were out. Some of them were on the floor; some were on top of the dresser where the defendant had been hunting clothes to wear.

Q. Did you see him do that?

A. No, I did not.

Q. Do you know of any other witnesses will testify this is what he did?

A. I don't know.

Q. You don't know, do you?

A. No.

MR. BENNETT: Your Honor, we reserve our objections to these articles.

THE COURT: All right, go ahead.

Q. (BY MR. BENNETT) Now, those were Exhibits "e" and "b." Now, Exhibit "c" shows lady's panties used—orient the picture for me.

A. This is a pair of lady's panties that the defendant used to gag Mr. Carver.

Q. When you say that you're talking about what you think or what you've been told?

A. What I've been told, yes, by Mr. Carver.

Q. You're saying these are a pair of panties that you found at the scene of the crime?

A. That's correct.

Q. And that's all you really know about them, isn't it?

[T 207] A. What I was told.

Q. Now, is that this same pair of panties right here?

A. That's correct.

Q. Referring to Exhibit "S-c." What are the panties sitting on?

A. They're on a box, an empty box, that was setting side a chair in the living room.

Q. In the living room?

A. That's correct.

Q. And that was where you found them?

A. That's correct.

Q. And what is that? That appears to be writing. Do you know what that is?

A. It has a chess board, or something, that says, "It's your move."

Q. It says, "It's your move"?

A. That's correct.

MR. BENNETT: Your Honor, at this time we'd object to the pictures of the sheets for the reasons we stated. The others we have no objections to.

THE COURT: Exhibits "g" and "n" and "h" and "c" are admitted without objection.

(The photographs referred to were thereupon received in evidence.)

MR. BENNETT: We were talking about this piece of wood.

THE COURT: Don't you have a picture of the wood?

THE WITNESS: There's black and white pictures.

MR. BENNETT: You don't want to go into the black and whites?

MR. HAYES: No.

Q. (BY MR. BENNETT) Where was the stick found?

[T 208] A. It was in the bed room. As you go in the bed room from the living room there's a dresser on your immediate right. It was laying on the dresser in the bed room.

THE COURT: Is there any objection to that stick? What is the number of it?

THE WITNESS: State's Exhibit 4.

THE COURT: Is there any objection to it?

Q. (BY MR. BENNETT) Was there anything sitting on top of it?

A. Yes, sir; there was.

Q. What?

A. There was a drawer that had been taken and laid on top of it—a dresser drawer that was laying partially on one end of it.

THE COURT: All right, any objection?

MR. BENNETT: We have no objection to that.

THE COURT: Admitted without objection—State's Exhibit 4.

(The exhibit referred to was thereupon received in evidence.)

Q. (BY MR. BENNETT) Now, there were some cigarette butts. Where are they? What is that? 13?

THE COURT: Is there any objection to them?

MR. BENNETT: Your Honor, we will object to the—of course, the package hasn't been opened.

THE COURT: Objection sustained. Go on with the next one.

MR. BENNETT: T-shirt, trousers and sox, State's 10.

Q. On the laundry mark you stated that this was the laundry mark given to Ehrlich Coker?

A. That's correct.

Q. Tell me whether or not you know that by any means other than hearsay?

[T 209] A. Other than what——

Q. (Interposing) Answer my question. Do you know that by any means other than what someone told you?

A. No, sir.

MR. BENNETT: Your Honor, we move to exclude and strike all that testimony pertaining to who that laundry mark belongs to. It would be illegal and incompetent evidence.

THP COURT: How was this information obtained? Was it obtained as a result of your investigation?

THE WITNESS: Myself and Agent Hatchett, yes, sir. We went to the Ware Correctional Institute.

THE COURT: Objection overruled, then.

MR. BENNETT: Subject to our objection, your Honor?

THE COURT: That's State's Exhibit what?

MR. BENNETT: 10.

THE COURT: Admitted over the objections given.

(Exhibit 10 referred to was thereupon received in evidence.)

MR. BENNETT: S-10 consists of more than just one item. The T-shirt, trousers and sox are in this bag. We are agreeable to their being admitted subject to our objection to identification of laundry mark.

THE COURT: All right. Go ahead with the next one. Are there no other exhibits you are offering? You offered all of them, didn't you?

MR. HAYES: That's right.

MR. BENNETT: Well, those are what you identified at this time.

MR. HAYES: We have identified State's Exhibit No. 3.

MR. BENNETT: We have no objection to it.

[T 210] THE COURT: Exhibit No. 3 is admitted.

(State's Exhibit 3 was thereupon received in evidence.)

THE COURT: What else, Mr. Hayes?

MR. HAYES: We tender State's Exhibit No. 5—the towel and stuff he was tied up with.

THE COURT: I've already admitted pictures of that.

MR. BENNETT: No objection.

THE COURT: State's Exhibit No. 5 admitted without objection.

(State's Exhibit 5 was thereupon received in evidence.)

THE COURT: State's Exhibit 2 admitted without objection.

(State's Exhibit 2 was thereupon received in evidence.)

MR. HAYES: I tender in evidence State's Exhibit No. 1.

MR. BENNETT: We object to that.

THE COURT: Admitted over objection.

(State's Exhibit 1 was thereupon received in evidence.)

MR. PRITCHARD: This (indicating) is part of Exhibit 10, and we will mark it "10-a."

MR. BENNETT: There is no objection to it.

THE COURT: Admitted without objection.

(State Exhibit "10-a" was thereupon received in evidence.)

MR. HAYES: And "10-b."

MR. BENNETT: No objection.

THE COURT: "10-b" admitted without objection.

(State's Exhibit "10-b" was thereupon received in evidence.)

Q. (BY MR. HAYES) Now I show you State's Exhibit No. 8. I believe [T 211] you've already looked at it. What is that?

A. This is a white shirt, a pair of brown sox and tennis shoes.

Q. You've already testified to that, too, haven't you?

A. Yes, sir.

THE COURT: He's already testified that over objection.

MR. BENNETT: There's more to Exhibit 8 than just a white T-shirt.
THE WITNESS: It's not a T-shirt.
MR. BENNETT: What else?
THE WITNESS: There's a pair of tennis shoes and a pair of brown sox in there.
MR. BENNETT: Did you find these tennis shoes?
THE WITNESS: No, I did not.
MR. BENNETT: We object to the tennis shoes.
MR. HAYES: Take the tennis shoes out.
MR. BENNETT: What about the sox? Did you find them?
THE WITNESS: No, sir.
MR. BENNETT: We object to the sox.
MR. HAYES: Take the sox out.

Q. (BY MR. HAYES) What about the shirt?
A. Yes, sir; I did recover the shirt.

MR. HAYES: We tender the shirt.
THE COURT: State's Exhibit what?
MR. HAYES: No. 8.
THE COURT: This is the white shirt. It is admitted without objection.

(The shirt referred to was thereupon received in evidence.)

Q. (BY MR. HAYES) This is State's Exhibit No. 6 that you've already identified when you were on the stand before?
A. That's correct.

[T 212] MR. BENNETT: These are items that belonged to the defendant?
THE WITNESS: I don't know who they belonged to. I took them off of him.
MR. BENNETT: You took them off of him?
THE WITNESS: That's correct.
MR. BENNETT: Your Honor, we object to this as being irrelevant unless it is shown to have some connection with the case.

THE COURT: Admitted over objection.

(State's Exhibit 6 was thereupon received in evidence.)

Q. (BY MR. HAYES) State's Exhibit No. 3—you've already testified to that.

A. Yes, sir. This is the bed sheet.
MR. HAYES: We've already tendered State's Exhibit No. 9, as I recall, and it's been admitted.

THE COURT: I don't recall.
MR. BENNETT: We object to it strenuously. We feel like the chain of custody has been broken and there's been no proper foundation shown. There's no showing that it's the same billfold. This is not only a billfold, but there's a driver's license and Social Security card.
MR. HAYES: Which is part of it.
MR. BENNETT: We move to exclude and suppress all of it.
THE COURT: Overruled.

(State's Exhibit 9 was thereupon received in evidence.)

THE COURT: Is there anything else? Does the State offer any other exhibits?
[T 213] MR. HAYES: Not at this time.
THE COURT: All right, at this time we will take a recess.

(Whereupon, at 12:32 P.M., September 21, 1974, a recess was taken.)

AFTER RECESS

1:45 P.M., September 21, 1974.

THE COURT: What is the State's announcement now?
MR. HAYES: The State rests.
THE COURT: Proceed for the defendant.

DR. C. M. JOHNSON was thereupon called as a witness in behalf of the defendant, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. BENNETT) State your name, please.
A. Clarence M. Johnson.
Q. And, where do you live, Doctor?
A. St. Simons Island, Georgia.
Q. Are you engaged in the practice of medicine in the State of Georgia?
A. Yes.
Q. What type of medicine, if any, do you specialize in?
A. Psychiatry.

Q. Do you have an office here in Waycross?

A. I work with the Mental Health Center here in Waycross.

Q. Now, would you state where you attended college?

A. Social Sciences at the University of Tennessee; medical education, University of Tennessee Medicol School at Memphis; residency in psychiatry in University of Tennessee, Memphis, Tennessee.

[T 214] Q. In Memphis, Tennessee?

A. Yes.

Q. And you are now practicing the specialty of psychiatry?

A. Yes.

Q. Doctor, I'll ask you if you had occasion to evaluate and examine professionally an individual known as Ehrlich Anthony Coker.

A. Yes.

Q. Tell the jury what you did with him and what you found.

A. I examined Mr. Coker on November 13th this year at the Mental Health Center here in Waycross. At that time my examination consisted of a mental status evaluation, and this involved a routine procedure of trying to determine if there was any abnormal or disturbed mental conditions, to determine the individual's need, if any, of therapy or for other professional recommendations, and this is essentially what the examination consisted of.

Q. Now, this was a medical examination, as such, or psychiatric examination?

A. This is considered a medical psychiatric examination.

Q. Now, that is called a psychiatric examination?

A. Yes.

Q. Now, would you describe generally the significance of this and what you do when you conduct such an examination, and what limitations you were under in the evaluation that was more or less forced upon you in this case?

A. Well, this was just primarily an interview evaluation without any other diagnostic aids. From the evaluation we set out to try to determine the history of the individual. This is what we call the past history associated with the complaints or the alleged symptoms that an individual may have and try to correlate from the history and historical data that we can [T 215] obtain, and with the observations

that we make at the time of the examination in regards to certain checks upon the individual's intellectual functionings, his ability to react to reality situations, we try to determine from this a, what we call, mental status of the individual.

Q. Now, Doctor, without having talked to you or coached you on what to say in the case, I'd like to ask you, please, in testifying to refrain from any reference whatsoever to what the defendant told you relative to the charges now against him, or to any charges that might have been against him in the past for which he is serving time. Do you understand that?

A. Yes.

Q. Now, this jury is only concerned now with what you found, if anything, about this defendant, Ehrlich Anthony Coker. Do you see him here in the court room?

A. Yes.

Q. Is that the defendant sitting at the counsel table there?

A. Yes.

MR. BENNETT: Let the record show that he is identifying the defendant Coker.

Q. Now, Doctor, will you tell the jury, please, what you found as a result of your psychiatric evaluation?

A. The conclusion of the interview and the evaluation was inconclusive.

Q. Inconclusive of what?

A. That I did not reach or determine a definite diagnosis in this case. I felt there were indications that further testing was indicated.

Q. Now, further testing because of what?

A. Because of the observations that were made during the examination made it inconclusive.

[T 216] Q. Did you find positive, direct evidence of any mental or psychiatric disorder?

A. There were several observations that were made that indicated that this could not be excluded.

Q. That it could not be excluded?

A. Yes.

Q. In other words, you did find evidence of psychiatric disorder?

MR. HAYES: Now, your Honor, we object to him leading the witness.

THE COURT: Objection sustained. Don't lead your own witness, now.

Q. (By MR. BENNETT) Doctor, what were your recommendations for further examination?

MR. HAYES: We object to that as being irrelevant.
THE COURT: Overruled.

Q. (By MR. BENNETT) What, specifically, did you recommend by way of further treatment or evaluation?
A. It was felt that two diagnostic aids would be helpful. One was the electroencephalogram; the other would be psychological testing.
Q. Now, Doctor, did you have access to an electroencephalogram here in Waycross?
A. I did not.
Q. Did you have access to what you said—accurate psychological evaluation or testing here in Waycross?
A. I did not feel like I did.
Q. What you're saying is that it was beyond your power to do this within the time frame of what you had to do with this individual?
A. That would be correct.
Q. Now, Doctor, what, if any, psychiatric disorder did you [T 217] find in the defendant? What specific evaluation of mental status did you find as a result of your evaluation?
A. There were two areas that were of concern to me. One was the inappropriateness of Mr. Coker's feeling, or affect, as we call it. This is his ability to respond with a feeling or attachment to various things that's happened in his life that we would expect someone to respond to.
Q. Would you say that his reaction was normal or——

MR. HAYES: (Interposing) Now, your Honor, we object to him leading the witness.

Q. (By MR. BENNETT) Doctor, how would you classify his reaction?
A. I would say it was inappropriate.
Q. Now, to what extent or degree of inappropriateness are you talking about?
A. Well, this is to the degree that is generally described as blandness—lack of emotionality.
Q. Would you say it's pathological?

MR. HAYES: Now, your Honor, we object to this type leading.
THE COURT: That is leading, Mr. Bennett.

Q. (By MR. BENNETT) Is there any other term of severity that you can apply to the diagnosis that you came up with or the conclusion that you reached?
A. As far as the diagnosis, this would be just one of many symptoms.
Q. It would be one of many symptoms?
A. Right. It could lead to a diagnosis. It would not be conclusive.
Q. Now, it would be a symptom of what, Doctor?
A. Well, often this affective disorder, affective type of feeling, [T 218] is found in several psychiatric disorders. In the area of psychosis, or the area that we call schizophrenia. The other sometimes is individuals who have personality disorders or character disorders, such as antisocial, psychopathic personality.
Q. Now, Doctor, do you have reason to suspect any of those conditions in this defendant?

MR. HAYES: Your Honor, we object to what he had reason to suspect. It's getting to the point of complete imagination on his part.
THE COURT: Let's get his finding with some degree of certainty.

Q. (By MR. BENNETT) Did your finding indicate or suggest any possibility of any of those conditions that you just described?

THE COURT: Are you saying that is a possibility?
MR. BENNETT: No, sir. Do your findings indicate the possibility of any of these?
THE COURT: That's what the objection was to, I understood. It's too indefinite—possibility.
MR. BENNETT: Well, we try to be as definite as we can, but we're trying to show what we can by this witness.
THE COURT: That's what I want you to do—show the facts.
MR. BENNETT: That's exactly what I am trying to do.
THE COURT: Let him state his findings, and let's go on.
MR. HAYES: We object on the ground that "possibility" is so speculative as to amount to imagination.

MR. BENNETT: May we be heard on that?

THE COURT: Ask the doctor what his findings are and let's go on.

Q. (BY MR. BENNETT) Will you give us what your findings are?

[T 219] A. Well, in relation to the observation of the inappropriate affect that was observed during the interview, this was in response to happenings or events during the lifetime that he was—we would expect some emotionality or concern. Some of these events were related to personable people in his life, like relatives. Others were to various situations that the individual was confronted with as far as some of his behavior.

Q. All right, sir. Now, Doctor, what did this inappropriate affect manifest itself as, and how did it appear to you?

A. Well, the form of detachment from the related event or situation.

Q. All right, sir, how detached was he from these situations?

A. I think I stated to a pathological degree.

Q. What does that mean, Doctor?

A. Well, that it is abnormal.

Q. Are you saying that this is a symptom of the other sicknesses that you indicated?

MR. HAYES: Now, we object to that. He hasn't testified to other sicknesses and stuff. He is leading him again.

THE COURT: Well, go ahead. I'm going to let you go ahead with this.

Q. (BY MR. BENNETT) I understood you to enumerate possibly four mental diseases. I think one was schizophrenia, psychosis, and several others, and you said that this inappropriate affect is one among many other symptoms of those particular mental illnesses. Is that correct?

A. Yes.

Q. All right. Doctor, what, if anything, did you find about his impulse disorder?

A. From the history obtained, this had been a problem since early [T 220] childhood.

Q. Now, what does impulse control mean, and use terms that the jury can understand?

A. This is a reaction or a behavior that is out of context

with the situation that presents itself. Usually, it is expressed in the form of anger, aggressiveness.

Q. Would there be possibly a violent reaction to a situation?

A. Yes.

Q. Now, are you able to express to the jury what degree or lack of impulse control you're talking about in the case?

A. Well, in reference to early childhood, he was often very combative with his peers, often severely involved in conflicts, fighting, and things like this.

Q. Now, Doctor, what if anything, were you able to find about his knowledge of right and wrong in a given situation? Well, let me withdraw that question and ask you, you were more or less acquainted with the charges against the defendant, were you?

A. Yes.

Q. Now, without going into detail of what those charges were, or what was told to you about them, or anything like this, or what he said to you about them, did you consider the question of whether or not he was able to judge between right and wrong in those situations?

A. This was an inclusive [sic] finding. This was why I recommended further evaluation.

Q. All right. So, what you're saying, then, is, if I may state it another way——

MR. HAYES: (Interposing) We object to him stating what the doctor said. Let the doctor tell what he means himself.

Q. (BY MR. BENNETT) What do you mean by that, Doctor?

[T 221] A. Well, there was one particular entity that I was concerned about. This is the possibility of a seizure disorder that sometimes accounts for this explosive, combative behavior, and, in neurology we call it a temporal lobe syndrome, or temporal lobe seizure disorder. Often this is, I think, substantiated by research and by studies in neurology and psychiatry. Also, these are more notable when the individual is under the influence of alcohol.

Q. What is the temporal lobe syndrome, Doctor?

A. This is a disorder whereby abnormal electrical impulses are emitted from the temporal lobe of the brain that controls the behavior of an individual, and the reaction when these seizures are present sometime can be very aggressive, destructive outbursts of behavior. Usually associated with some amnesia or loss of memory after the event.

Q. Doctor, did the defendant exhibit any signs of amnesia or loss of memory?

A. In regards to certain events he stated that at times he did not know all the details of what went on.

Q. Now, this temporal lobe syndrome that we're talking about, is it a form of mental disease?

A. It is considered a disease of the brain, yes.

Q. What type of condition is it? Is it a mental disorder or is it a physical disorder?

A. There are some seizure disorders where there are organic lesions present.

Q. Now, is this something, then, that possibly an operation or some other test might show the existence of?

MR. HAYES: Now, we object to that as being too highly [T 222] imaginary and speculative about some possibility.

MR. BENNETT: Your Honor, I——

THE COURT: (Interposing) Go ahead. I will let you ask it.

MR. BENNETT: Your Honor, I don't mind the District Attorney objecting, but I'm just trying to get the doctor to tell what he knows, and all Mr. Hayes has said so far is that everything he's said is speculative.

THE COURT: I will allow you to go ahead and ask the question. Go ahead.

Q. (BY MR. BENNETT) Doctor, can the presence of this lobe disorder you're talking about be objectively or physically demonstrated or precluded?

A. Yes, there are certain tests that can be made.

Q. What are those tests?

A. Well, electroencephalogram can be very diagnostic. Also sometime in using the electroencephalogram plus what we call an intoxinterview, allowing the individual to become intoxicated and then recording his electrical impulses of the brain, sometime will show even a more or higher percentage of pathology.

Q. Are these the tests that you would recommend for him or have recommended for him?

THE COURT: Let's go on with that. That's not going to decide any issue before the court. Go on with another question.

MR. BENNETT: May we have an answer to that one?

THE COURT: No. What we want to know is what the doctor knows of this person's condition.

Q. (BY MR. BENNETT) All right, now, Doctor, can you tell us anything else about his condition?

THE COURT: Not what the doctor might find out if he had additional time, or anything like that. I don't want to [T 223] dwell on that any further. All we want to know is what the doctor has determined as a result of that examination.

Q. (BY MR. BENNETT) Now, Doctor, what, if anything, else can you tell us about the defendant's knowledge of right and wrong?

A. Well, I felt that at the conclusion of my examination in summing [sic] that there were underlying psychiatric conflicts to the extent of which I was unable to determine, and I don't feel that with the examination I did that I can answer that, either positive or negative.

Q. Do you have any kind of opinion at all that you can share with the jury?

THE COURT: I understood him to just say he didn't have any opinion at this time.

MR. BENNETT: Well, I'm just asking him if he has any kind of opinion.

THE COURT: Well, I understood him to say he didn't, but I may have understood him wrong.

THE WITNESS: I could not reach a definite opinion.

Q. (BY MR. BENNETT) But you did find the existence of underlying psychiatric source?

A. Yes.

Q. Now, Doctor, when we're talking about impulse control, or the lack of it is what we're really talking about, isn't it?

A. Yes.

Q. Let me ask a hypothetical question: If an individual suffers from a lack of impulse control, or what you call an explosive personality, then would at the moment of a lack or loss of impulse control, or at the moment of explosion we're talking about—aggressive behavior—would he be able to control his actions at that precise time?

A. Well, obviously ——

[T 224] Q. (Interposing) Without some intervening force or direction?

A. Well, this in itself—explosive behavior is, I think, uncontrollable.

Q. It is uncontrollable?

A. Yes.

MR. BENNETT: All right, you may cross examine.

CROSS EXAMINATION

Q. (BY MR. HAYES) What you're really saying to the jury, Doctor, is that he had uncontrollable temper?

A. This is the case sometime.

Q. A while ago you referred to the fact that he could get this way when he was under the influence of alcohol? Is that what you said?

A. This hapens in some individuals.

Q. If he was not under the influence of alcohol at the time this wouldn't be the situation, would it?

A. This could happen without being under the influence of alcohol in some individuals.

Q. Doctor, a while ago you were asked a question about possibilities did you reach any medical conclusions that you felt were a certainty about this defendant, anyway?

A. No, I didn't.

Q. Did you study the history that was given to you about this defendant—prior history from other doctors?

A. Yes. This was observed and studied after I saw him.

Q. Did you find in any of the records where he had been committed to an insane asylum?

A. I saw no record.

Q. Did you find any record that said he was ever insane in any way?

[T 225] A. No.

Q. You have already said that you would not state he is insane, haven't you? That you had no opinion?

A. That's the only thing I could say.

Q. Doctor, had you ever seen him before this occasion?

A. No.

Q. When did you first see him?

A. November 13th.

Q. And how much time did you spend with him?

A Approximately forty-five or fifty minutes.

Q. Have you examined him since that time?

A. No.

Q. Would it be a correct assumption to saw that the forty-five minutes that you spent with him you spent listening to the defendant tell you whatever he had to say, or talking to him?

A. In reference to questions I would ask him.

Q. Did he tell you what happened in this case?

A. We discussed some of it.

Q. Did you check with the officers of Ware County to see whether or not he had told you the truth?

A. I did not.

Q. Didn't you feel that it would be important to determine whether or not this fellow was telling the truth?

A. Yes.

Q. Doctor, do you know whether or not he was aware that he was being charged with this crime he is charged with at the time he talked with you?

A. Yes.

Q. You really don't know whether or not when you asked him a question he was trying to tell you the truth or not, do you?

[T 226] A. This was strictly an evaluation of his statements.

Q. When you saw him did you give him an X-ray examination?

A. No, I did not.

Q. Did you give him what you call the EG test, tracing the electrical impulses on him?

A. I did not.

Q. Doctor, did you give him the neurological examination to check his nervous system?

A. No.

Q. Did you check and determine whether or not he had any brain damage?

A. Well, during the mental status we check for possibility of brain damage.

Q. Doctor, did you find any brain damage on this defendant?

A. No, I did not.

Q. You found no brain damage and you found no actual damage to his nervous system, did you?

A. I did not examine his nervous system.

Q. You really didn't find anything, did you, Doctor?

A. Well, I think I stated that I did find concerning history

as well as observations during the interview that made me concerned about possibility of psychological or emotional difficulty.

Q. When you say "emotional," that doesn't mean he is insane, does it? Isn't everybody emotional?

A. Yes. But I felt this was to a pathological degree in Mr. Coker.

Q. What do you mean "to a pathological degree?"

A. Abnormal.

Q. Abnormal?

A. Yes.

Q. Well, Doctor, isn't everybody abnormal in some respects?

[T 227] A. This is a difficult question.

Q. Can you answer the question? Is everybody abnormal in some respects, in your opinion?

A. Psychologically speaking, yes.

Q. Your answer is yes, then? So, actually, Doctor, some that you said about him you could probably say about everybody in the court room, couldn't you?

A. No, sir; I don't think so.

MR. HAYES: You can come down, Doctor.

REDIRECT EXAMINATION

Q. (BY MR. BENNETT) Mr. Hayes asked you did you find brain damage and I think you said "No?"

A. Doing the mental status I did not find it.

Q. You said you could not rule it out—why could you not rule it out, Doctor?

A. I felt that electroencephalogram was indicated.

Q. Did you find any symptoms that might be consistent with possible brain damage, or with brain damage?

A. There was one that was suggestive. That was loss of remote memory.

Q. Loss of remote memory?

A. Yes. And the history of amnesia.

Q. And you did find it in this case?

A. Yes. I think it's there.

Q. Doctor, you did make a written report, didn't you?

A. Yes.

Q. That is not in the jury's hands, so the only information we can give them is what you testify to. Doctor, on your

written report on page 2 did you or did you not state that he suffers from an underlying——

MR. HAYES: (Interposing) Your Honor, we object to him [T 228] leading him, from some report.

THE COURT: Go ahead.

Q. (BY MR. BENNETT) Did you or did you not state "in view of his inappropriate affect or feeling tones along with explosive and impulsive behavior that is sometimes combative and his emotional detachment from stressful events that have happened in the past, it appears we are dealing with an underlying psychiatric disorder?" Did you not state that in your report?

A. Yes.

Q. Is that your opinion today?

A. Yes.

MR. BENNETT: Thank you, sir. You may come down.

REDIRECT EXAMINATION

Q. (BY MR. HAYES) Doctor, let me ask you one other question before you come down: Now, when the defendant went before you, Doctor, did he realize that after you saw him you might be coming to court to testify for him?

A. I'm not sure if he did or not.

Q. You didn't ask him?

A. After I saw him?

Q. At the time he told you these answers whatever he wanted to tell you?

A. That I would be here in court?

Q. That he went to see you for this purpose.

A. No, I did not have that opinion.

MR. HAYES: You can come down.

(Witness excused)

MR. BENNETT: Your Honor, at this time the defense rests.

THE COURT: The defense rests.

MR. HAYES: The State closes.

[T 229] MR. BENNETT: We close.

(Evidence closed)

THE COURT: Ladies and gentlemen of the jury, I instruct you now that it is stipulated—that means that it is agreed

to as if it had been proven, and the jury will take it as true, that the defendant in this case has prior to this time and prior to the date on which he was charged with escape, been convicted of a prior felony, and was at the time of the alleged escape in lawful confinement in the Ware Correctional Institution.

All right, you may proceed with the argument.

(During the argument to the jury of Mr. Hayes the following objections were made:)

MR. HAYES: • • • Like I said, I really don't think that, but if it had been me you would probably have had a funeral.

MR. BENNETT: Now, may it please the Court, we object to this kind of conjecture, and so on. It has nothing to do with this case. I think that's an improper argument. It's nothing that's in evidence, and I think it's something that should not be argued to the jury, and we object to it.

THE COURT: Stay away from personalities.

• • •

MR. HAYES: • • • And I'll tell you something else that's reasonable to assume—when those officers got there in that situation if he had put a knife to her at that time we wouldn't be having a trial today. That's exactly why he didn't.

MR. BENNETT: If it pleases the Court, we object and move for a mistrial. He is arguing something that is not in fact—he's made a statement the only effect of which would be to prejudice and inflame the minds of the jury. He's talking [T 230] about what may have happened if he had done something else, something much more severe than what actually happened. It can only have a prejudicial and inflammatory effect on the minds of the jury. We move the Court for a mistrial.

THE COURT: Overruled, but let's stay away from that any further.

• • •

MR. HAYES: • • • any contact with this fellow could mean instant death.

MR. BENNETT: Now, may it please the Court, we move again for a mistrial. He's talking about death, and that is entirely inappropriate and outside and beyond the facts in evidence in this case.

THE COURT: What was the statement?

MR. HAYES: I said contact with this fellow could mean that.

THE COURT: Could mean what?

MR. BENNETT: I think he said "instant death."

THE COURT: Overruled.

MR. BENNETT: We move the Court for a mistrial. It's improper argument.

THE COURT: Overruled. Let's stay away from that, though, Mr. Hayes.

[T 231] CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury, this is the case of the State versus Ehrlich Anthony Coker, and whenever I refer to Coker or the defendant that is the person to whom I am referring, this being case No. 5097 in the Superior Court of Ware County, Georgia.

Now, the grand jurors selected and chosen for the County of Ware (naming them) in Count 1, in the name and behalf of the citizens charge and accuse Coker with the offense of Armed Robbery, for that the said Coker, on the 2nd day of September, in the year 1974, did, with intent to commit theft, took from the person and the immediate presence of Allen Carver the following property, to wit: One billfold containing $20.30 in U. S. currency, of the property of Allen Carver, of the value of $20.30, by the use of a four foot 1 by 4 board and a knife, both being offensive weapons in the manner used.

Now, in Count 2 the defendant is charged with the offense of Rape, for that the said Coker, on the 2nd day of September, 1974, in the County aforesaid, did then and there unlawfully and with force and arms, did have carnal knowledge of Elinta Carver, a female, forcibly and against her will.

In Count 3 the defendant Coker is charged with the offense of Kidnaping, for that the said Coker, on the 2nd day of September, in the year 1974, in the County aforesaid (of course, referring to Ware), did abduct and steal away Elinta Carver, a person, without lawful authority, and held such person against her will.

Now, in Count 4 the defendant Coker is charged with Motor Vehicle Theft, for that the said Coker, on the 2nd day of September, 1974, in the County aforesaid, did take and carry away with intent to steal the same a certain motor [T 232] vehicle, to wit: One 1974 Chrysler, 4 door sedan, white in color, of the property of Allen Carver of the value of $600.00.

And in Count 5 the defendant is charged with the offense of Escape, for that the said Coker, on the 2nd day of September, 1974, did then and there unlawfully and with force and arms, after having been convicted of a felony, did intentionally escape from the Ware Correctional Institution in Ware County, Georgia, while under lawful custody of the Georgia Department of Corrections, and was thereafter retaken.

Now, I charge you in connection with Count 5, that being the count charging the defendant with Escape, it is admitted and stipulated by the defendant, through his attorneys, that at the time of the defendant's alleged escape on the 2nd day of September, he had been convicted of a felony and was at the time of the alleged escape the 2nd day of September, 1974, in the lawful custody of the Ware County Correctional Institution in Ware County, Georgia, while in the lawful custody of the Georgia Department of Corrections. Those two matters are admitted by stipulation by counsel for the defendant.

Now, to this indictment the defendant has entered his plea of not guilty, thereby denying all of the material allegations of the indictment, and placing on the State the burden of proving the guilt of the defendant on each count beyond a reasonable doubt.

Now, the defendant's general plea of not guilty also puts in issue the sanity of the defendant, and that question you are now called upon to decide in this case, and you must decide this question of the sanity of the defendant prior to deciding the guilt or innocence of the defendant on each charge, [T 233] and on that question I will further instruct you as we proceed with the charge.

Now, this indictment and the defendant's plea of not guilty constitute the issue that you are called upon to decide. Neither the indictment nor the plea of not guilty is evidence in the case and they are not to be considered as evidence by you. You will have the indictment and the plea of not guilty out with you and you may refer to it and read it in its entirety for a complete statement of the contentions of the State and of the defendant.

Now, I charge you, ladies and gentlemen of the jury, that every person is presumed innocent until proved guilty.

No person shall be convicted of a crime unless each essential element of such crime is proved beyond a reasonable doubt.

The burden of proof rests upon the State to prove each essential element of the crime charged in the indictment beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty.

Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt means just what it says. It is the doubt of a fair minded, impartial juror honestly seeking the truth. It is not an arbitrary nor a capricious doubt, but it is a doubt arising from the consideration of the evidence, from a conflict in the evidence, or from a lack of evidence.

If, after giving consideration to all of the facts and circumstances of the case, your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law and you should acquit. If that doubt does not exist in your minds as to the [T 234] guilt of the defendant, then you should convict the defendant.

You are the sole judges of the facts, the truthfulness of the witnesses and the weight of the evidence.

To weigh the evidence, you must consider the believability of the witnesses. You will apply the test of truthfulness which you apply in your daily lives. These tests include the demeanor of each witness upon the stand, his manner of testifying, the reasonableness of the testimony, the opportunity he had to see, hear and know the things to which he testified, his accuracy of memory, frankness or lack of it, intelligence, interest and bias, if any, together with all the facts and circumstances, surrounding the testimony of each witness. Now, applying these tests, you will assign to the testimony of each witnes[s] such weight as you deem proper. You may believe or disbelieve all or any part of the testimony of any witness. It is your duty to determine what testimony is worthy of belief and what testimony is not worthy of belief.

Now, evidence is all the testimony received from the witnesses, the exhibits admitted during the trial, and any facts agreed to by counsel.

Evidence may be either direct or circumstantial or both.

Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during the trial.

Evidence may also be used to prove a fact by inference. This is referred to as circumstantial evidence.

Circumstantial evidence is the proof of facts or circum-

stances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience.

[T 235] Circumstantial evidence alone will not justify a finding of guilty, unless the circumstances are entirely consistent with the defendant's guilt and wholly inconsistent with any reasonable theory of the defendant's innocence, and are so convincing as to exclude a reasonable doubt of the defendant's guilt.

When the guilt of the accused depends on circumstantial evidence alone, the rule is that each separate fact or link which goes to make up the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proven, and a fact not clearly proven should not be considered as a part of the chain of circumstances, but should be rejected by the jury; and the circumstances proven must not only be consistent with the guilt of the accused, but they must exclude every other reasonable hypothesis save that of the guilt of the accused. If any one or more of the circumstances relied by the State are not clearly proven, and for this reason you reject one or more of the circumstances relied on, then you will inquire whether the other remaining circumstances proven, if they are clearly proven, are consistent with the accused's guilt and inconsistent with any other reasonable hypothesis save that of the guilt of the accused.

All essential facts and circumstances necessary to show the commission of the crime or crimes and to connect the accused therewith as the party committing the act or acts must be proven by the State.

Now, the evidence does not include the indictment, as I have stated. It does not include the opening statements and the closing arguments of counsel. It does not include answers to questions and statements of counsel that you have been instructed to disregard; and you must not speculate as to why the Court sustained the objection to any questions or what the answer to [T 236] any such question might have been. You must not draw any inference or speculation on the truth of any suggestion included in such a question which was not answered.

Now, ladies and gentlemen, you may consider flight, if you find such in this case, and similar acts, if proven, from which an inference of guilt may be considered by the jury; but

flight, if any, is subject to explanation. The weight to be given to it, or whether the jury will draw a consciousness of guilt or not, is for the jury. It is for the jury to determine whether the flight of the defendant, if any such has been proven, was due to a sense of guilt or for other reasons, and if for other reasons no inference hurtful to the defendant on trial should be drawn.

Now, ladies and gentlemen, the law permits witnesses who have had special training, knowledge and experience in certain lines to give their opinions as experts based upon their knowledge of particular matters. The weight which is to be given the opinions of expert witnesses is for you to decide. You may accept it and act on it or reject it and then act on your own judgment as you apply it to the evidence in this case.

Now, I further charge you that intent to commit the crimes charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by the acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before them. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act or acts.

Now, ladies and gentlemen of the jury, I charge you [T 237] that by no ruling which the Court has made during the progress of this trial before you has the Court intimated or expressed any opinion upon the facts of this case, upon the credibility of the witnesses, upon the weight of the evidence, or upon the guilt or innocence of the defendant. By no portion of this charge has the Court intimated or expressed any opinion upon any of these matters, each and all of which belong exclusively to you for your judgment and determination. The Court states the law, you find the facts, you apply the one to the other and in that way decide the case.

The charge of the Court should be received and considered by you in its entirety, as a whole, in one body of law applicable to this case. Such repetition as did or might occur during the progress of this charge did not or will not take place for the purpose of emphasizing the principle or principles of law repeated over other principles of law, but such repetition as did or might occur took place simply in order

to better enable the Court to expound the law to you as the charge progresses in your presence.

You are the sole judges of the facts of the case; you are the sole judges of the credibility of the witnesses; you are the sole judges of the weight of the evidence; you are the sole judges of the guilt or innocence of the defendant.

Now, I charge you further that a crime is a violation of a statute of this State in which there shall be a union or a joint operation of act and intention or criminal negligence.

I will now give you certain presumptions of law that are applicable to this case:

A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the [T 238] contrary, and they are:

Every person is presumed to be of sound mind and discretion.

The acts of a person of sound mind and discretion are presumed to be the products of the person's will.

A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act or acts.

A person will not be presumed to act with criminal intention, but the triors [sic] of facts—the jury—may find such intention upon consideration of the words, conduct, demeanor, or motive, and all other circumstances connected with the act or acts for which the accused is being prosecuted.

A specific intent to commit the crimes charged in this indictment is an essential element that the State must prove beyond a reasonable doubt.

Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct.

Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before them. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act or acts.

I charge you that under Georgia law every person is presumed innocent until proved guilty, and that this presumption remains with the defendant throughout the trial until such time as the State introduces sufficient evidence to overcome the presumption.

I further charge you that no person shall be convicted of a crime in the State of Georgia unless each element of the crime is proved beyond a reasonable doubt.

I further charge you that intention is an essential [T 239] element of any crime, and that the burden is on the State to prove such intention beyond a reasonable doubt.

I further charge you that while the burden is not on the defendant to disprove intention, nonetheless when he introduces some competent evidence of insanity which might tend to negate evil intention in the defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime, and, therefore, had the requisite criminal intent.

I further charge you that under Georgia law a person will not be presumed to act with criminal intention, but the triers of fact, the jurors, may find such intention or the absence thereof upon consideration of the words, conduct, demeanor, motives, evidence of sanity or insanity, and all other circumstances connected with the act for which the accused is prosecuted.

I further charge you that this presumption of sanity may be relied on by the State, and in most cases the State need not bear the burden of introducing evidence and of persuasion as to the sanity of the accused in criminal proceedings; but once the affirmative defense of insanity is raised by the defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State, in order to prove the criminal intent of the accused, must present evidence to prove the sanity of the accused beyond a reasonable doubt.

I charge you that the question of whether or not the defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the defendant introduce evidence of his insanity sufficient to [T 240] convince you beyond all reasonable doubt, but, rather, it is only necessary for him to introduce some competent evidence of his insanity. When he has done this, the burden shifts to the State to prove his sanity beyond a reasonable doubt.

I charge you that a person shall not be found guilty of a crime if at the time of the act, omission or negligence con-

stituting the crime, such person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence.

I charge you that a person shall not be found guilty of the crime when at the time of the act, omission or negligence constituting the crime such person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

I further charge you that a person may be suffering from delusional insanity even though he can distinguish right from wrong.

I charge you that if the defendant in this case has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion arising from a diseased mind, his will is overmastered and he is impelled to do that act, there is not criminal intent as required by law.

I charge you that in event your verdict in this case is for acquittal of the defendant on the ground that he was insane or mentally incompetent under the law at the time the act or acts charged against him were committed, then you shall specify in your verdict that the accused was acquitted because of mental irresponsibility or insanity at the time of the commission of the [T 241] commission of the act.

Now, ladies and gentlemen of the jury, I charge you that the test of criminal responsibility in this State is that if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. And there has been but one recognized exception—delusional compulsion. Our law provides a person shall not be found guilty of a crime when at the time of the act, omission or negligence constituting the crime, such person, because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

Now, in this State no cognizance is taken of what has been termed impulsive or emotional insanity, where a criminal act is done under some overwhelming and irresistible impulse, unless it be that such impulse is the result of a mental disease or mental defect overriding reason and judgment and obliterating the sense of right and wrong so as to fall

within the generally accepted right and wrong test, or the exception above referred to of delusional compulsion. Nor under our law is any recognition taken of so-called moral insanity, or of an irresponsibility from a lack of ability to control the will from the habit of indulgence; nor does mental abnormality, mere weak mindness, unless amounting to imbecility or idiocy, which, like lunacy or insanity, may be held to deprive the offender of the sense of right and wrong. Now, the defendant being impressed with delusions of hallucinations is not enough. His criminal act must stem from such mental disease, injury or congenital deficiency, or else his accountability for the criminal act is measured by the [T 241a] general test of whether he could at the time of the crime's commission distinguish right from wrong. However, our law emphatically declares that an insane person shall not be convicted of any crime with the commission of which he may be charged, provided the act so charged as criminal was committed in the condition of such insanity. The act itself may be so utterly senseless and abnormal as to furnish satisfactory proof of a diseased mind.

Insanity may be only a temporary nullity, and if the accused, at the time of the act with the commission of which he is presently charged, did not have reason sufficient to distinguish between right and wrong with reference to that act, he would not be criminally responsible, the test of criminal responsibility being the condition of his mind at the time of the commission of the acts.

In a criminal case the standard by which acts are to be judged is that of the conduct of a reasonable person; and when the evidence shows conduct which deviates from such normal behavior and a penal statute is violated thereby, it is adjudged to be criminal unless excused by insanity or delusional compulsion resulting from mental disease, injury or congenital deficiency.

Now, in determining sanity, the jury may consider the actions and mental condition of the accused before and after the commission of the alleged offense; and the declarations, if any, of the defendant made at the time of the alleged offense, or reasonably close thereafter, may be considered as proof of his mental condition at the time of the alleged crime.

Opinion testimony relative to sanity or insanity, either lay or expert, is by no means conclusive upon this issue, but

is peculiarly dependent upon the facts or evidence supporting such opinion or opinions. The weight to be given such opinions is [T 242] solely for the determination of the jury.

Now, as stated, the general test to be applied is, first, did the defendant have reason sufficient to distinguish between right and wrong in relation to the crime about to be committed? If he did not, he is not criminally responsible, and you should so find. If, however, you determine that at the time of the commission of the offenses charged the defendant did have reason sufficient to distinguish right from wrong as to the particular acts charged, and you further determine that by reason of mental disease, injury or congenital deficiency he acted as he did because of a delusional compulsion, either of a temporary nature or permanent in character, and such compulsion as to such act overmastered his will to resist committing the crime, then in such event he would be excused of such crime by reason of delusional compulsion. Now, thus, if you should find that the defendant did not have reason sufficient to distinguish between right and wrong, as I have instructed you, or that knowing right from wrong, because of mental disease, injury or congenital deficiency, he acted as he did as a result of delusional compulsion, that would be an end to your consideration of this case, and you would stop at that point and enter a verdict that would so find, and the form of that verdict would be, "We, the jury, find the defendant not guilty by reason of insanity."

Now, if, in consideration of the evidence, you determine that at the time and place of the occasion under investigation that the defendant was sane, and, as I have previously instructed you, then in such event he would be responsible for the commission of such act or acts if he did, in fact, commit the acts charged. In that event, you would proceed to consider the other portions of the charge I have given you and am now about to give you.

[T 243] Now, as I have stated, the crimes charged in this indictment are, Count 1, Armed Robbery; Count 2, Rape; Count 3, Kidnaping; Count 4, Motor Vehicle Theft, and Count 5, Escape.

I charge you that a person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon.

The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

Now, I charge you that an accused may be convicted of a crime included in a crime in the indictment.

I charge you that the offense of robbery by intimidation is a lesser included offense in the offense of armed robbery.

In considering the guilt or innocence of the defendant on the charge of armed robbery, you will consider the guilt or innocence of the defendant of the lesser included offense of robbery by intimidation.

Now, I charge you that an accused may be convicted of a crime included in a crime charged in the indictment, information or accusation. A crime is so included when (a) it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged, or (b) it differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest, or a lesser kind of culpability suffices to establish its commission.

As I have previously charged you, the offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery. And I charge you that a person [T 244] commits robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another.

Now, I charge you that a person commits rape when he has carnal knowledge of a female forcibly and against her will.

Carnal knowledge and rape occurs when there is any penetration of the female sex organ by the male sex organ.

No conviction shall be had for rape on the unsupported testimony of the female.

Testimony of the female must be corroborated by other competent evidence.

I charge you that a person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

Now, the defendant is charged on Count 4 with theft of a motor vehicle. A motor vehicle is defined as every vehicle

which is self-propelled, except tractors, trollies, which are classified as street cars in Subsection 6(c) thereof.

The theft of any motor vehicle, as I have defined it to you, is a felony.

I charge you that a person commits theft by taking when he unlawfully takes, or, being in lawful possession thereof, unlawfully appropriates any property of another with intention of depriving him of said property, regardless of the manner in which said property is taken or appropriated.

And in Count 5 the defendant is charged with escape, and I charge you that a person commits escape when he, having [T 245] been convicted of a felony or misdemeanor or of a violation of a municipal ordinance, intentionally escapes from lawful custody, or from any place of lawful confinement.

Now, ladies and gentlemen of the jury, you will determine, from a consideration of all the facts and circumstances of the case and the charge of the Court, whether the defendant is not guilty by reason of insanity, and if, from a consideration of the evidence and the charge of the Court, you determine that the defendant is not guilty by reason of insanity, this will end your deliberations, as I have charged you, and the form of your verdict would be, "We, the jury, find the defendant not guilty by reason of insanity."

Now, if you determine that the defendant was sane, then he would be responsible for his alleged acts, and, if, in fact, you determine he did commit the act or acts charged in the indictment, you would then go further and determine the guilt or innocence of the defendant on each specific charge as set out in the indictment.

Now, I charge you that if you believe beyond a reasonable doubt that the defendant did, in the County of Ware, commit the crimes set out in the indictment, as charged in the indictment, then you would be authorized to find the defendant guilty of those crimes.

Now, I charge you that if you have a reasonable doubt that the defendant is guilty of the crimes set out in the indictment, it would be your duty to give him the benefit of that doubt and find him not guilty.

Now, when considering the guilt or innocence of the defendant on the charge of armed robbery, you will at such time, provided you believe the defendant guilty beyond a reasonable [T 246] doubt, you will at such time determine

whether you find the defendant guilty of armed robbery or guilty of the lesser included offense of robbery by intimidation; and in the event you find the defendant guilty of armed robbery, the form of your verdict would be, "We, the jury, find the defendant guilty of armed robbery." And in the event you find the defendant guilty of the lesser offense of robbery by intimidation, the form of your verdict would be, "We, the jury, find the defendant guilty of robbery by intimidation."

Now, all of the instruction I have just given you refers to Count 1 of the indictment.

Now, if you find the defendant not guilty you will so specify "not guilty" and name the offense and the Count.

If you find him guilty you will specify the count and the offense.

Now, to aid you in returning a verdict in this case we have prepared for you a verdict form which you may look at, and it reads in this manner: "Count 1—Armed Robbery. We, the jury, find the defendant (guilty or not guilty) of the offense of Armed Robbery, or the lesser offense of Robbery by Intimidation."

That will be the determination of guilt or innocence on Count 1.

On Count 2, the count concerning Rape, the form of your verdict will be, "We, the jury, find the defendant (not guilty or guilty) of Count 2."

Count 3, Kidnapping: "We, the jury, find the defendant (not guilty or guilty) of Count 3."

Count 4, Motor Vehicle Theft: "We, the jury, find [T 247] the defendant (not guilty or guilty) of Count 4."

Count 5, Escape: "We, the jury, find the defendant (not guilty or guilty) of Count 5."

Date it and sign it by one of your members as your foreman and return it into open court.

Now, at this time it is your sole responsibility to determine the guilt or innocence of the defendant, considering all the evidence, the facts and circumstances of the case and the charge of the Court. You are not at this time concerned with any punishment.

Now, ladies and gentlemen, you may now retire, but do not begin consideration of this case until you receive the indictment and all of the exhibits.

Take the jury out.

(Whereupon, at 5:08 P. M., November 21, 1974, the jury retired from the court room.)

THE COURT: What I have submitted to counsel for the State and the defendant is that Count 5, which is the escape count, in the original indictment it is stated that after having been convicted of the offenses of Rape and Kidnaping in the Superior Court of the County of Richmond, State of Georgia; the offenses of Murder and Rape in the Superior Court of the County of Clayton, State of Georgia; and the offenses of Rape and Aggravated Assault in the Superior Court of Taliaferro, State of Georgia, did intentionally escape from Ware Correctional Institution in Ware County, Georgia, while under lawful custody of the Georgia Department of Corrections, and was thereafter retaken.

Now, I have had that rewritten, and where it refers to [T 248] any prior convictions specifically, I had that taken out and inserted this: "After having been convicted of a felony," with no mention of any specific convictions.

Now, is that complying with the request of the State and the defense?

MR. HAYES: Your Honor, it is the understanding of the State that this has been done at the specific request of defense counsel—they asked the Court to do it. Now, if that is true, we have no objection to it.

THE COURT: That's correct. That's why I am doing that.

MR. BENNETT: Your Honor, we have no objection to what you've done. Our motions speak for themselves.

THE COURT: We won't go into that.

MR. BENNETT: We asked you to sever, and that's the very least to do—exactly what you've done.

THE COURT: Are there any further suggestions on Count 5.

MR. BENNETT: Nothing from us.

THE COURT: Now, here is the original as it was. We will leave it in the custody of the Clerk, to be kept as part of the original record, but it is not going out for the jury to see it.

. . .

(After sometime the jury returned into court with a verdict finding the defendant guilty on all five counts of the indictment.)

(At the request of counsel for the defendant, the jury was polled, as follows:)

THE COURT: Now, ladies and gentlemen of the jury, we are fixing to poll the jury, and I'm going to ask each one of you to stand, individually, and the question that I ask now [T 249] will apply to each one of you. The verdict that you have heard read out—heard the Clerk read out—I will ask each one of you individually, Is that your verdict, and did you arrive at this verdict freely and voluntarily? Now, we will call your names and you will either answer yes or no.

(The name of each juror was called and all jurors answered in the affirmative.)

Now, is there any other question that counsel for the State or counsel for the defendant desire to ask of this jury at this time? If so, you may do so.

MR. HAYES: No questions for the State.

MR. BENNETT: None for the defendant.

THE COURT: Now, ladies and gentlemen of the jury, this particular trial is what we call a triplicated trial. That means that it has three parts. The first part was a determination of the question on a special plea of insanity. That has been determined. And the next phase of this trial was the guilt or innocence of the defendant on the five counts of the indictment. You have just completed that phase of the trial by finding the defendant on each count. The next phase of this trial will be the punishment to be imposed on each count on which the defendant was found guilty. This jury will play a part in that now. That will not take place until tomorrow, because there will be evidence introduced, there will be arguments, and there will be an additional charge of the Court concerning the punishment, and there will be another decision for this jury to make. Now, obviously, we cannot go into it tonight, so you will be again kept together. You cannot be dismissed until we are finally through with this case. This is part of your obligations as citizens that we talked to you about. We have [T 250] already made arrangements to sleep you tonight and to feed you, and anything else you might need. So, Mr. Cady will take charge of this jury again under the same instructions given throughout the trial of this case. They still apply. They apply to the alternate juror. You will keep him separate and apart, but we still must keep that one alternate we have left.

Take this jury now and keep them safe and provide for their needs in the way of food and drink and a place for them to sleep tonight. Keep them away from any newspaper or any radio or anything that might concern this trial, because it is possible something might be on about it. I don't know whether there will or not. Is there any objection to them watching television?

MR. BENNETT: No, sir. We will object to possibly any local news.

THE COURT: Well, I can't monitor local news. You're either going to have to let them watch television or not.

MR. BENNETT: I'm talking about local newspapers.

THE COURT: Well, we're not going to let them have any newspaper. Let's keep that away from them, but let them watch television because that has been agreed to by counsel for the State and the defense.

MR. BENNETT: We would have no objection whatsoever.

THE COURT: That's fine. And bring them back and we will be back here in the morning at nine o'clock. Take the jury out.

(Whereupon, at 7:05 P. M., November 21, 1974, an adjournment was taken.)

[Pre-Sentence Investigation Report]

PRE-SENTENCE INVESTIGATION

NAME: Ehrlich Anthony Coker ALIAS:

ADDRESS: COUNTY: STATE:

RACE: W SEX: M AGE: 25 HT: 5' 7" WT: 145

BIRTHDATE: March 31, 1949

OFFENSE:

DATE ARRESTED: TIME IN JAIL:

ARRESTING OFFICER: DEFENSE ATTORNEY:

JUDGE:

COURT:

REPORT DATE: November 21, 1974

PRESENT OFFENSE:

CIRCUMSTANCES:

This information was taken from an investigation written by Deputy R. L. Dunsmore with the Ware County Sheriff's Department.

The Ware County Sheriff's Department received a call to the home of Allen Carver on State Street in reference to someone breaking into their home and tieing them up and taking Mr. Allen Carver's wife hostage.

Upon arrival investigating officers Deputy R. L. Dunsmore, Sheriff W. E. Strickland, Sgt. Glynn Rouse, Sgt. Harry Watts, Deputy Charles Ammons, and Deputy Henry Strickland were met by Raymond Smith, a neighbor to Mr. Allen Carver. Mr. Smith stated that Allen Carver had come to his house with his hands tied together and asked him to call the law. He stated that someone had entered his home and left, taking his wife with him.

The officers then talked with the person that came to the Smith home and he identified himself as Allen Carver and that he was living in the house in front of Mr. Smith.

Allen Carver stated that he and his wife Elinta were stand-

ing by their kitchen stove when a white male entered the back door with a long stick. The person that came in the back door was Ehrlich Coker, white male, 26 years of age. Coker ordered Carver and his wife into their bedroom and started looking for a gun. Carver stated that he told the man, Ehrlich Coker, to take his wallet and money and not to hurt his wife and baby. Coker ordered Carver into the bathroom where he tied him to a shower curtain rod. Coker later returned and tied Carver's hands to the sink pipe and his feet to the bottom of the toilet. Coker then took Carver's wife into the bedroom where he raped her. Coker then took Allen Carver's wife and car and was reportedly to have been headed to Atlanta.

Coker stayed in the house approximately three hours before leaving. Coker left his prison clothes and changed into some of Carver's clothes. Coker's pants and tee shirt were found at the foot of Carver's bed. Carver stated that Coker had asked his wife how to get to Atlanta and she told him that he would have to go through Waresboro.

Carver managed to free his feet after Coker and his wife had left and ran to his neighbor's house where he told him what happened and he notified the Sheriff's Department.

Sheriff Strickland, along with several other County and State Units, proceeded up U. S. 82 to try to come in contact with Coker and Allen Carver's wife. At approximately 1:35 A.M. Deputy R. L. Dunsmore and Deputy Ammons received a call to meet the Sheriff at Fairfax to try to locate Coker. Upon arrival they talked to Sheriff Strickland and he advised them that he had seen the car but had lost it on 82 near Fairfax. Deputy R. L. Dunsmore and Deputy Charles Ammons, along with Sheriff Strickland, started checking every side of the road that ran off U. S. 82 near where the Sheriff stated he had lost sight of the vehicle.

Deputy Dunsmore and Deputy Ammons then went off 82 to the right on a dirt road and found Coker and Allen Carver's wife sitting in a white Chrysler with the car turned off and with the car pointed toward the oncoming deputy's car. Coker had his arm around Mrs. Carver's neck and was facing her. Deputy Dunsmore then called Sheriff Strickland and Sheriff Strickland came to the scene. Deputy Dunsmore, Sheriff Strickland, Deputy Henry Strick-

land, Deputy Jimmy Strickland, and Deputy Charles Ammons ordered Coker out of the car and handcuffed him and brought him to the Ware County Jail. Coker was wanted for escape from Ware C. I.

The following is a report given by Warden Bruce Brown of Ware C. I. about the incident of kidnapping and holding officers as hostages.

During the inside Alcoholics Anonymous Meeting held in the Visiting Room on September 2, 1974 at approximately 8:00 P.M., the following inmates were involved in kidnaping and holding as hostages Officers Joyce Shiver and Gene A. Barber: Dearwood Huggins, Samuel Bennie Butler, James Thomas Dixon, Robert Lawton Jones, William G. Brinks, and James E. Skidmore. Inmates Brinks, Jones, and Skidmore acted as ring leaders. The ring leaders had the use of a knife and a 24 inch handmade wrench weighing approximately 12 pounds and they ordered Officer Shiver not to interfere as they were planning to take over the institution and also planning a mass escape.

Shortly thereafter Officer Barber went to the Visiting Room to obtain a key from Officer Shiver. Officer Barber was jerked inside the Visiting Room and ordered not to interfere if neither officer wanted to get hurt.

Officer Terrell Sublet, who was in charge of the front gate at this time, was informed of what was going on in the Visiting Room by an inmate. This inmate worked in the Officer's Dining Room and was coming from the shower roow when he saw Officer Barber being pulled into the Visiting Room. He immediately came to the front gate and informed Officer Sublet of this happening. Officer Sublet immediately advised the Warden of what was taking place as he was not in his office at this time.

Warden Bruce Brown then went to the front gate and asked for a spokesman to inform him of what was taking place. Inmate Brinks came to the front gate and stated that he had two officers that they were planning to hold until they were promised a transfer from the institution that same night. Warden Brown told him to release the officers then they would discuss the demands.

Inmate Brinks went back into the Visiting Room and the

two officers were released unharmed. They in turn were ordered to lock up all the inmates and get a count immediately. The count showed three inmates missing. Roll call indicated that Frank Smith, Jr., Ehrlich A. Coker, and Jefferson Holland were the three missing.

Further investigation disclosed that they had escaped from the fire hatch in the loft of the Visiting Room and torn out the east vent escaping from the room of the building near the Officer's Dining Room area. After this they headed toward the ballfield and there freedom.

Warden Brown talked with Officers Shiver and Barber shortly afterwards. Both officers were in a high state of tension and stated they feared for their lives since Inmate Brinks and others were armed with a knife and a heavy iron wrench.

Warden Brown stated that warrants would be taken for all these inmates charging them, with the exception of Inmates Coker, Smith, and Holland, with kidnaping and interfering with officers in the line of duty. Inmates Coker, Smith, and Holland were charged with escape.

This report continued by saying that they will be prosecuted in the Ware County Superior Court.

Warden Brown continues by saying that a teletype had been sent this day of W. H. Lowe, Offender Administration Section, requesting transfer and segregation for all these inmates for security reasons.

The following is typed from copy of case study which is located in the institution file of Inmate Ehrlich Anthony Coker and retyped for purpose of complying with rules of Judicial Review Panel.

In September of 1972 the Grand Jury of Richmond County returned a True Bill of Indictment against the defendant charging him with the offense of kidnapping and rape. (Indictment #49, September Term, 1972)

Defendant's Version:

"I was managing the Hudson Oil Company located at 1831 Gordon Highway and codefendant Glenn Stacy was also working at the same station. We closed about midnight and

Stacy and I started driving around and drinking. We saw a girl going into a telephone booth and stopped and tried to talk to her. I walked up to where the glass was broken out on one side of the booth and she slapped me. I grabbed her and put her in the car with us and we went back to the service station. She had calmed down and was willing to have a sexual intercourse with me."

State's Version:

According to information received, the defendant did on July 29, 1972 have sexual intercourse with the complainant, Susan Lorraine Jones, forcibly and against her will, within the premises of the Hudson Oil Company located at 1831 Gordon Highway; Augusta, Georgia.

Upon further investigation, it was discovered that the defendant and co-defendant, Glenn Harlan Stacy, removed the complainant from a telephone booth against her will and forced her to go with them to the Hudson Oil Company at which time she was forcibly raped. Afterwards the defendant, Coker, put co-defendant, Stacy, out alongside the road and took the complainant to Wilkes County, Georgia where she was further beaten and molested. She was found later in a wooded area very badly beaten and at the point of death.

Upon reviewing photographs that were taken in reference to this case, the complainant, Susan Lorraine Jones, was put through a living Hell. She had bruises and black eyes with a distorted face which made her look like some kind of freak. Having been drug through brush and along the ground in her state of nakedness, the skin was literally scraped from her body and she was a raw mass of flesh, along her breast and chest cavity and shoulders.

Co-defendant, Glenn Harlan Stacy, was also indicted along with the defendant, Anthony Coker, but as of this date disposition in his case is still pending.

PREVIOUS CRIMINAL RECORD:

Fulton County Juvenile Court:

Date	*Offense*	*Disposition*
5-27-65	Breaking and Entering	Placed on Probation
11-10-65	Ungovernable and Beyond the Control of His Parents	Continued on Probation with Stipulation that he return to school and attend regularly.
3-24-66	Delinquency by Running Away From Home and Being Beyond the Control of His Parents	Continued on Probation

Atlanta Police Department:

9-18-69	Child Molestation	None

Augusta Police Department:

Reports no record

Richmond County Sheriff's Department:

7-29-72	Rape and kidnapping	Present offense
10-11-72	Murder	Hold for Clayton County Authorities. Bench Warrant
3-12-73	Rape	Life
	Kidnapping	20 years consecutive

Clayton Superior Court:

2-73	Ct. 1, Rape	20 years
	Ct. 2, Murder	Life

Taliaferro Superior Court:

8-72	Ct. 1, Aggravated Assault	8 years
	Ct. 2, Rape	Life

F.B.I.:

9-18-69	Child Molestation (Felony)	
12-28-72	Murder	Life
3-19-73	Rape	Life, 20 yrs. cs
	Kidnap	cs

PREVIOUS PLACE OF RESIDENCE:

The defendant was born in Atlanta, Georgia. He has previously lived in Montgomery, Alabama, and 922 George Road; Augusta, Georgia.

RELIGIOUS AFFILIATION:

The defendant stated that he is not affiliated with any church organization.

EDUCATION:

The defendant stated that he completed the tenth grade at Walter George School in Atlanta, Georgia.

FAMILY BACKGROUND:

Father:	Jasper Coker, age 55, 1117 Pontiac Circle Austell, Georgia. Occupation: House painter.
Mother:	Mary Coker, 1117 Pontiac Circle: Austell, Georgia. Occupation: House wife
Brothers:	David Coker, age 20, Student at Georgia State College
Sisters:	Yvonne Coker, age 14 Dana Coker, age 11, both live at 1117 Pontiac Circle, Austell, Georgia.
Wife:	Brenda Williams Coker, 235 Echo Dale Road; Charlotte, North Carolina.

MILITARY BACKGROUND:

The defendant stated that he joined the United States Army on August 20, 1967 and received an Honorable Discharge on September 15, 1970. As of this report, this information has not been verified.

EMPLOYMENT:

The defendant stated that he was previously employed by the Supersonic Car Wash Company in Forest Park, Georgia

prior to working at the Hudson Oil Company in Augusta, Georgia.

EVALUATION:

This 23 year old white male is charged with the offense of Kidnapping and Rape. He does have past previous involvements with law enforcement agencies and has offered considerable problems to authorities in the Atlanta Area. The defendant never finished his formal education, having dropped out of school while in the tenth grade. Nothing concrete at this point is known about his family background. At the time the crime occured, he was the manager of the Hudson Oil Company in Augusta, Georgia.

Respectfully submitted,

S/ J. M. Perkins, Jr.
Probation-Parole Supervisor
Augusta Judicial Circuit

Submitted March 28, 1973.

The following information was taken from an evaluation of Coker completed at Georgia Diagnostic and Classification Center in Butts County. This information was taken from subject's inmate file.

Education Accessment, WRAT. Reading; 10.5: Spelling; 11.2: Math; 8.5: Culture; fair: I.Q.; 98.

Coker claims to have received his G.E.D. while serving in the Army in 1967. The test results indicate that he is presently functioning on a 10th grade level overall.

JIMMY GRIFFIN
Jimmy Griffin
Probation-Parole Supervisor
Waycross Judicial Circuit

TOMMY ROUSE
Approved: Tommy Rouse
Chief Probation-Parole Supervisor
Waycross Judicial Circuit

JG:fph

[Verdict]

VERDICT OF JURY

COUNT 1—ARMED ROBBERY

We, the jury find the defendant guilty of the offense of Armed Robbery of Count 1.

COUNT 2—RAPE

We, the jury find the defendant guilty of Count 2.

COUNT 3—KIDNAPPING

We, the jury find the defendant guilty of Count 3.

COUNT 4—MOTOR VEHICLE THEFT

We, the jury find the defendant guilty of Count 4.

COUNT 5—ESCAPE

We, the jury find the defendant guilty of Count 5.

This 21 day of Nov., 1974.

Auvie Joyner
FOREMAN OF THE JURY

[Presentence Hearing Transcript: Ware County Superior Court]

PRESENTENCE HEARING.

November 22, 1974.

[S 1]* THE COURT: Ladies and gentlemen of the jury, you have returned a verdict of guilty on each count in this case. Now, at this time this Court will resume this trial for the purpose of conducting a presentence hearing, and the only issue for this jury to determine now shall be the punishment to be imposed on the defendant in this case. Now, in this presentence hearing the State and the defense will have a right to introduce evidence to the jury, additional evidence, in extenuation and mitigation and aggravation of the punishment, including the record of any prior criminal conviction, and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal conviction and pleas. Now, upon completion of the introduction of the evidence each party will then have a right to present their summation or their closing arguments similar to what we've already had in this case.

Now, we invite your very close attention to this evidence because it is just as important now as it ever has been for you to listen to the evidence and to understand what is going on. The jury will actually be only concerned with the punishment in Count 1 and Count 2. Count 1 is the count in which you found the defendant guilty of Armed Robbery. Count 2 is the count in which you found the defendant guilty of Rape. Now, as to Count 3, Kidnaping, Count 4, Motor Vehicle Theft, and Count 5, Escape, those three counts you will not be concerned with fixing punishment. Those three will be left up entirely to the discretion of the Court under the law; so, keep in mind that you are concerned with Count 1 on Robbery and Count 2, Rape—fixing the punishment in those cases.

All right, gentlemen, you may proceed.

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* Page references to the transcript of the Presentence Hearing, paginated from 1–73, will be prepared by "S."

[S 2] MR. PRITCHARD: If it please the Court, the State will announce that as required by the law, we did serve notice on the defendant of the prior records to Kontz Bennett, Jr., on November 11th, 1974, showing he was convicted in the Superior Court of Richmond County of Rape and Kidnaping, on March 12, 1973; that April 6, '73, in Clayton Superior Court he was convicted of Rape and murder; in Taliaferro Superior Court on May 28, '73, he was convicted of Rape and Aggravated Assault. We served that on November 11, '74, to E. Kontz Bennett, Jr., and we'd like the Court Reporter to mark that as State's Exhibit 1, to show that the notice was served, and that he was convicted of these offenses. The prior record contains a copy of each one of these indictments and sentence of the Court.

(The document referred to was thereupon marked for identification "S-1".)

MR. PRITCHARD: We would also like to show at this time on November 15th we served on E. Kontz Bennett, Jr., additional notice of aggravating circumstances which shows all of these same convictions in the Superior Court was previously served on him, and also the additional aggravating statutory grounds which we intend to prove, that the offense of Armed Robbery was committed by a person with a prior record of conviction of a capital felony in Count 1; and as to Count 2, Rape, the offense of Rape was committed by a person with a prior record of convision upon a capital felony; and also the offense of Rape was committed while the defendant was engaged in the commission of another capital felony, to wit: Armed Robbery, which is charged in Count 1 of the indictment.

That will be State's Exhibit 2.

(The document referred to was thereupon marked for identification "S-2".)

[S 3] All of these have been filed with the Clerk, and we do want to tender them in evidence as a part of the record in this case to show that prior notice was properly served upon counsel for the defendant as required by Georgia law.

THE COURT: Have you examined it, Mr. Bennett?

MR. PRITCHARD: May it please the Court, we tender these into evidence for the sole purpose of showing that prior notice of the record was served upon attorney for the defendant.

THE COURT: Any objection?

MR. BENNETT: We will stipulate that on November 11, 1974, we received what they have had marked as State's Exhibit 1. We received a copy of it. We will object to the admission of State's Exhibit 1 because it's not a certified copy and does not contain any certified copy of any record, as such. I understand it's offered only for the purpose of showing proof of a copy. We will stipulate to that, and I would have no objections to the front sheet here, if that's what he wants, which is his certificate. I will stipulate as to the fact that he handed me an exact copy of the same thing on the date that he said he did. I don't know what he's tendering here. It's not a certified copy of any record, and we object to it.

MR. PRITCHARD: If it please the Court, we are just tendering the actual original notice into evidence to show that we have served him. It's not to go out with the jury, as long as he stipulates he has received notice of it.

THE COURT: Let it be admitted into the record.

MR. BENNETT: I stipulate that I received what you've got here, but, your Honor, I do object to what's under this notice.

THE COURT: All right, it's a record not for the jury to decide. It is admitted for record purposes, not to go out with the jury.

[S 4] (The document referred to was thereupon received in evidence.)

MR. BENNETT: We will stipulate that we received a copy of State's Exhibit 2 on November 15, 1974. I think Mr. Pritchard handed it to me in person.

MR. PRITCHARD: The only purpose of it is to show that we have served him with prior notice of this record.

MR. BENNETT: I think the record will speak for itself. The only thing we have received notice of, so far as the record goes, is exactly what is contained in State's Exhibit 1. Now, that's the only record we've been informed of.

MR. PRITCHARD: That's correct. We'll be bound by what we served him with.

THE COURT: State's Exhibit 2 will be admitted.

(The document referred to was thereupon received in evidence.)

BRUCE BROWN was thereupon called as a witness in behalf

of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. PRITCHARD) Will you state your name for the record?

A. Bruce Brown.

Q. What is your occupation?

A. Warden.

Q. Warden of what?

A. Ware Correctional Institution, Waycross, Georgia.

Q. How long have you been warden here in Ware County?

A. Since November 15, 1973.

Q. Do you know Ehrlich Anthony Coker?

A. I do.

[S5] Q. Do you see him in the court room?

A. Yes, sir.

Q. Point him out for me.

A. To the left of Attorney Strickland.

MR. PRITCHARD: Let the record show that he is pointing at the defendant, Ehrlich Anthony Coker.

Q. Back on September 2nd, 1974, whose custody was he in?

A. Mine.

Q. By what authority?

A. Under the authority of the Board of Corrections, under legal sentences imposed by several counties.

MR. BENNETT: We object to the phrase "legal sentences." That is calling for a conclusion.

THE COURT: Go ahead.

Q. (BY MR. PRITCHARD) All right, state what your record shows.

A. May I use my record?

Q. You may use your record.

A. Inmate Record Sheet indicates that he was given a sentence 3-12-73 in Richmond County Superior Court for the offense of Rape and Kidnaping and was given a life sentence.

MR. BENNETT: May it please the Court, we object to this testimony. We think the record itself would be the highest and best evidence of what he was convicted of. We object to any hearsay or secondary information as to what the record of conviction may be.

THE COURT: I believe he has testified that he has the official record.

MR. PRITCHARD: He has the official record, and we will connect it all up with certified copies.

MR. BENNETT: Well, your Honor, his official record [S 6] is not the highest and best evidence of what they are trying to prove, and that's the basis of our objection.

MR. PRITCHARD: A Supreme Court decision says the opposite.

Q. Will you state now his conviction in Richmond Superior Court. Give the date.

A. The date is 3-12-73 for the crime of Rape and Kidnaping. He was given a life sentence computed 7-29-72 with a 20 year consecutive sentence for Kidnaping.

From the Clayton County Superior Court dated 4-6-73, for the offense of Rape and Murder. He was given 20 years for rape to run concurrent. He was given a life sentence for murder, to run consecutive.

From Taliferro County Superior Court, dated 5-28-73, for the offense of Rape, he was given a life sentence, to run concurrent; and for aggravated assault, two counts, he was given an eight year sentence to run consecutive.

MR. PRITCHARD: May it please the Court, I'd like to have identified at this time an indictment from the Superior Court of Richmond County, Indictment No. 49. Will you mark this, please?

(The document referred to was thereupon marked for identification "S-3".)

MR. PRITCHARD: May it please the Court, at this time we would like to have marked Indictment No. 7-12081, February Term of Clayton Superior Court, 1973, the State versus Ehrlich A. Coker.

(The document referred to was thereupon marked for identification "S-4".)

MR. PRITCHARD: I would like to also have marked for identification Indictment No. 226, Talifaerro Superior Court, [S 7] August Term, 1972, the State versus Ehrlich Anthony Coker.

(The document referred to was thereupon marked for identification "S-5".)

MR. BENNETT: May it please the Court, with respect to State's Exhibit No. 3, we object to its admission in evidence and move to exclude any reference thereto, for the reason that the document shows on its face that the indictment was of a different person. His name is spelled differently.

We also object to what appears to be a certified copy of a sentence, there it states in there that "said defendant was represented in this court by Mr. O. L. Collins, Attorney at Law". We submit that that is not the signature of Mr. O. L. Collins on the indictment, and it is a fatal error and variance between the statement in the record as to who the attorney was and who apparently signed. We submit, therefore, that he was not represented by counsel at the time this conviction or plea or whatever it is was taken, and we move to exclude it entirely from consideration of this jury. That is with respect to State's Exhibit No. 3. The name is clearly spelled wrong.

THE COURT: Let me see that certified copy.

MR. BENNETT: May it please the Court, I would like—let me approach the bench.

(A conference took place off the record between the Court and counsel.)

THE COURT: The objection is overruled, subject to proper identification of the defendant as being the same person.

MR. PRITCHARD: We will show that it is the same individual and that is the same crime he was convicted of.

THE COURT: All right, gentlemen, let's proceed.

Q. (By MR. PRITCHARD) While he is doing that, Warden, I will hand you back State's Exhibit 3, and will you compare this [S 8] certified copy with your record and see if that's the same person and the same time?

A. Yes, sir; it is the same.

Q. It is the same as your record? Is that correct?

A. Yes, sir.

MR. BENNETT: If it please the Court, in respect to State's Exhibit No. 5, we respectfully object to the admission of it into evidence and move to exclude any previous reference to it on the ground that it shows the name of the defendant is misspelled, and we submit that it's not the same defendant.

We object to the introduction of the indictment, or a

copy of the indictment itself into the record. The law provides for the introduction of a sentence or a plea, and there's neither sentence nor plea found on the indictment. Now, the sentence is here, and I think that of all these documents, this alone would be admissible.

THE COURT: All right, overruled. Let's proceed.

Q. (BY MR. PRITCHARD) I will hand you State's Exhibit No. 4, and ask you to compare this indictment from Clayton Superior Court with your record and see if it is the same person.

A. It is.

MR. PRITCHARD: May it please the Court, we tender State's Exihibit No. 4 into evidence. Do you want to reserve all these until we finish?

MR. BENNETT: May it please the Court, let him go ahead and I will make all of my objections at one time.

THE COURT: I've already admitted it. Go ahead.

MR. PRITCHARD: Look at State's Exhibit No. 5, and compare that with your records, and see if it is the same individual and the same charge that you are holding him under.

A. This is in Taliaferro County. Yes, sir.

[S 9] Q. Does your file contain photographs of the subject?

A. Of the individual?

Q. Yes.

A. Yes, sir.

Q. Will you examine that photograph and tell me if it is the same individual?

A. It is, yes, sir.

MR. PRITCHARD: Witness with you.

CROSS EXAMINATION

Q. (BY MR. BENNETT) Warden, will you please open your file?

(The witness exhibits file to counsel)

Q. Warden, relative to the Richmond County case?

A. All right, sir. Just turn a few pages there.

Q. I want the Taliaferro sentence.

A. This is Richmond County here. You want Taliaferro?

Q. No, sir. I meant Richmond County. Excuse me. And he's asked you to identify the sentence and the indictment.

THE WITNESS: Let me go down to the table.

THE COURT: All right.

(The witness takes his records down to a table where he and counsel examine them, and then the witness returns to the stand.)

Q. (BY MR. BENNETT) Now, Warden Brown, I take it that you do not have a copy of the alleged indictment?

A. It's not in this file. It would be in his permanent file, possibly in Atlanta.

Q. So that when you say that you can identify his Richmond County record you were referring only to the sentence?

A. Right.

Q. And not the indictment?

A. No, sir.

[S 10] Q. You are not identifying the indictment?

A. No, sir.

MR. BENNETT: If it please the Court, at this time we would move to exclude the indictment itself.

MR. PRITCHARD: We will connect it up with other evidence. We have plenty of other evidence.

Q. (BY MR. BENNETT) Now, Warden, with respect to the Clayton County record?

A. All right, sir.

Q. May I see that?

(The witness exhibits record to counsel.)

Q. Now, Warden, on the page that you are looking at, which is a copy of the front face of the indictment—is it not?

A. Yes. It's part of the front, yes.

Q. Now, directing your attention to the upper portion of it, looking up the sheet, lengthways up the sheet, to this portion at the very top—is that completed in your copy?

A. No. This portion of this is not complete, but this—I understand this is ——

Q. (Interposing) I will show you the copy that has been tendered in evidence—is that corresponding portion completed?

A. There is a difference between your copy and mine, so far as that is concerned. This portion of mine has not been completed.

Q. So, what you're saying is that your copy is different from the copy that has been tendered in evidence?

A. The copy I'm looking at here, yes.

Q. So, you don't have a complete copy of what has been tendered in evidence? Is that correct, with respect to the Clayton County record?

A. All I can testify to here is the front portion here.

Q. I'm talking about the upper portion of the indictment.

[S 11] A. It's not complete in my record.

Q. It's different from what has been tendered into evidence, is it not?

A. Yes, sir.

Q. So, there is a difference with respect to the face of the indictment?

A. Right, yes, sir.

Q. Now, with respect to the Taliaferro indictment.

THE COURT: Gentlemen, what are we doing there?

MR. BENNETT: Your Honor, I am comparing his copy that he's identified these with with what has been tendered into evidence. I'm trying to find out what it is.

THE COURT: All right, ask him about it.

MR. HAYES: Your Honor, what he's doing—we tendered in evidence certified copies of the record in the Clerk's office of the County where he was sentenced. Now, he has records there that are not complete. We're using him only to identify these, and he's trying to show this is a certified copy of his, which is not so. He can only identify as to the numbers, and so on.

THE COURT: If you want to ask him some questions, go ahead and ask him.

MR. BENNETT: May it please the Court, they have tried to identify his copies as being the same as these, and, therefore——

THE COURT: (Interposing) No, I don't think so. Go ahead and ask him some questions. The purpose of the State furnishing you a certified copy of the record of this defendant prior to the trial was so that you may satisfy yourself. That is why the law requires the State to serve on the defendant's attorney before the trial copies of the record of the defendant that they propose to introduce. So, you

have had an opportunity—[S 12] the law provides you with an opportunity to make any objections to this. If you contend this is not the defendant, then you should bring in evidence here to object to it. Now, we are going to move along with the trial. If you've got any evidence you want to introduce that this is not the defendant they have introduced a record of, we will hear any evidence you've got.

MR. BENNETT: Your Honor, I don't think the burden is on us in the first place. In the second place——

THE COURT: (Interposing) All right, move on.

MR. BENNETT: May we cross examine him or not?

THE COURT: Yes, if you will, but you haven't said a word to him yet.

MR. BENNETT: I'm comparing the copy that has been served on me with the copy that he has identified as pertaining to this man.

THE COURT: All right, if you've got some questions to ask him, ask them. If you haven't, then we're going to move along.

Q. (BY MR. BENNETT) Warden, would you turn to what appears to be the front page of this indictment No. 226 in Taliaferro County?

A. I don't have the front.

Q. Do you have the indictment itself?

A. This is just part of it.

Q. You do not have the complete indictment from Taliaferro County? Is this correct?

THE COURT: Answer, please, if you know. If you don't have it, say you don't. If you do, say you do, and let's move along.

THE WITNESS: Apparently I don't.

THE COURT: All right, he doesn't. What's the next [S 13] question?

Q. (BY MR. BENNETT) Then, you can't testify that the copy that's been introduced into evidence is a true and correct copy of what's in your file?

A. No, sir.

Q. And you can't, therefore, testify that what they've got on this table pertains to this man here, can you, sir?

A. As far as my knowing.

Q. As far as your knowing and as far as what your record shows?

A. No, sir.

MR. BENNETT: Your Honor, based on that, we move to exclude it.

THE COURT: All right, overruled.

REDIRECT EXAMINATION

Q. (BY MR. PRITCHARD) Warden Brown, does your file show the actual sentence sheet? That's not a certified copy, is it?

A. No, sir; it's not a certified copy.

Q. You don't have a certified copy of the indictment?

A. No, sir.

Q. But you have the sentence sheet which was sent to you from the Board of Corrections?

A. Right.

Q. And you have the sentence sheet in each one of these cases?

A. Let me check that.

Q. I will hand you State's Exhibit 3. Look at that. From Richmond County. Ehrlich Anthony Coker. No. 49. Is this in your record here the same on the sentence sheet?

A. This is with the exception of this, now. This could not be copied.

[S 14] Q. The Clerk left off this part here? Is that correct?

A. That's right.

Q. And put it down here?

A. Yes.

Q. She certified that? Is that correct?

A. Yes, sir.

MR. BENNETT: If it please the Court, our objection is to using the Warden's file to physically identify this man as being the man to whom the official court record pertained. He doesn't even have complete copies of the court records. That's the point and the only point that we're trying to raise. They're trying to get the Warden to say——

THE COURT: I understand. Are you making another objection?

MR. BENNETT: Well, can we state in the record our objection?

THE COURT: Well, I understood that all the time. You have a right to make an objection and you've made it. Gentlemen, let's proceed with something else.

Q. (BY MR. PRITCHARD) Now, the record is also here from Clayton County? Is that correct?

A. Yes.

Q. And it is not a certified copy, but it does contain the same information? Is that correct? Clayton Superior Court? In other words, you have a complete history sheet on this man?

A. Yes, sir.

Q. Warden, once again I will ask you to look at the defendant. Is he the same person? Is he the same individual?

A. Yes, he is.

MR. BENNETT: If it please the Court, we object to that as being a bare conclusion that the jury has to draw. We don't [S 15] feel like the Warden—the Warden can testify that this is the man that pertained to the file that he has. It would be very competent evidence, but to say that he's the man that pertains to these official court records when he doesn't have a complete copy of them, I don't think he's qualified to say that and we object to it. That's a decision or a judgment that the jury has to make.

THE COURT: All right, overruled.

MR. PRITCHARD: No more questions, and call in Gary L. Hull.

(Witness excused)

MR. BENNETT: May it please the Court, at this time we object to anyone by the name of Gary L. Hull testifying since we have not been served with his name on the list of witnesses that we were furnished with.

MR. PRITCHARD: May it please the Court, I will stipulate that we did not. If Mr. Bennett will read Davis versus State 225 Ga., page 509, the only thing we are required in a presentence hearing is to furnish him with the record itself. The only ones we have to furnish him with are the witnesses to be used on a presentence hearing who testify as to identity of those records.

THE COURT: All right, objection overruled.

MR. BENNETT: Also let the record show that the State has failed to state in its place that it didn't have the name of this witness prior to trial.

MR. PRITCHARD: I will definitely state in my place that

at the time this original trial started we did not have the name of this individual.

MR. BENNETT: If it please the Court, every one of these [S 16] indictments contains that witness' name. We feel like that is a misstatement of facts.

MR. PRITCHARD: We had no way of knowing that we would use this witness until this jury——

THE COURT: Objection overruled.

GARY L. HULL was thereupon called as a witness in behalf of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. PRITCHARD) State your full name for the record, please.

A. My name is Gary L. Hull, Investigator for the District Attorney's office in the Augusta Judicial Circuit in Georgia.

Q. How long have you been with the District Attorney's office there?

A. I've only been with the District Attorney's office for a year. Previous to that I was Investigator with the Richmond County Sheriff's office in Richmond County, Georgia, for approximately seven years.

Q. Do you know Ehrlich Anthony Coker?

A. Yes, sir; I do.

Q. Have you ever had any dealings with them?

A. Yes, sir; I have.

Q. Do you see him in the court room?

A. Yes, sir; he's sitting, the last man on the right as I am facing him. The defendant has got a moustache, short hair, and has a tattoo on his right arm.

Q. Do you know what that tattoo says?

A. It's been several years. I can't remember.

Q. You can't remember?

A. No, sir; I don't remember exactly, but I do remember seeing it.

[S 17] Q. Have you ever had any cause to make any investigation of the subject?

A. Yes, sir; I did.

Q. When did this investigation take place?

A. Do you mind if I get some of my notes out?

Q. Go ahead.

A. (Referring to records) Sir, on July 29, 1972, I answered a call at a 'phone booth on U. S. Highway 25 in Richmond County, Georgia, where I found a young lady's car who was reported missing. I found a set of keys in the 'phone booth. Part of the glass in the door was broken—busted out——

MR. BENNETT: (Interposing) May it please the Court, we object to this testimony. At the beginning of this portion of the trial we were served with notices of copies of indictments and sentences based thereon. We were not served with notices of any evidence of Mr. Hull. We were not served with his name as a possible witness to appear in this case, and we have not had an opportunity to talk to him in advance.

THE COURT: Are you making that same objection again? You've already objected to him being a witness due to the fact that you were not served with his name.

MR. BENNETT: His name was not on the list of witnesses, and I'm also objecting to him that we were not given any notice—we were given notice of a record, but not notice that he would testify, or any evidence that he would offer.

THE COURT: You've already made that objection.

MR. BENNETT: Well, I didn't think I had.

THE COURT: Well, you have, and it's overruled again.

Q. (BY MR. PRITCHARD) Will you go ahead, sir?

A. I was at this location at the 'phone booth on Peach [S 18] Orchard Road in Richmond County. I found a young lady's pocketbook in her car open as if she had, of course, left the scene not on her own will to leave her pocketbook there and her keys in the 'phone booth, and the glass was broke. Approximately an hour later after her mother had put out this missing report and I had located her vehicle at this shopping center, I received a call from my headquarters that a young girl——

MR. BENNETT: (Interposing) Your Honor——

MR. PRITCHARD: (Interposing) Don't tell what someone said. What did you do and where did you go and what did you find?

A. As a result of my investigation, I went to the Taliaferro County-Wilkes County Hospital up in Taliaferro County. On my arrival I was met by physicians who showed

me one Susan Jones, a white female, sixteen years old, and at this time I started investigation.

Q. Her name was what?

A. Susan Lorrine Jones.

Q. Did you see Susan Lorrine Jones at that time?

A. Yes, sir; I did.

Q. Do you have a photograph of her?

A. Yes, sir; I do.

Q. Who took that photograph?

A. I did.

Q. Whose possession has that photograph been in?

A. Mine. At this time when I found her and photographed her she was in very severe condition, very, very bad condition. She had been found on the edge of a road. I also have photographs of where I investigated that scene where her body was left completely beaten and left apparently for dead, with no clothes on, and carried back into these woods approximately fifty feet.

MR. PRITCHARD: Wait just one second. Will you mark [S 19] these as State's exhibits?

(The photographs referred to were thereupon marked for identification "S-6" to "S-17", inclusive.)

MR. BENNETT: Your Honor, may we approach the bench?

THE COURT: Yes.

(A conference took place off the record between the Court and counsel.)

THE COURT: Just go ahead with it.

Q. (BY MR. PRITCHARD) Gary, the person you saw in the hospital—will you examine those photographs?

A. Yes, sir; I took these photographs of Susan Lorrine Jones in the Wilkes County Hospital, which is located in Taliaferro County, Georgia, of her condition, and these photographs are a very, very true and accurate representation of the way that I saw her body—may I retract that? She was not dead. She was only unconscious. I saw her physical, living body at that morning.

Q. Now, I will hand you State's Exhibit 3, and ask you are you familiar with this indictment?

A. This is the indictment which was returned from the grand jury of Richmond County, Georgia, on one Ehrlich

Coker, where I testified as the arresting officer of Mr. Ehrlich Coker for Kidnaping and for Rape.

Q. Now, this indictment charged him on the 29th day of July, 1972, unlawfully with force and arms abduct and steal away Susan Lorrine Jones, a person, without lawful authority and warrant and held such person against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

Now, in this kidnaping of Susan Lorrine Jones, is this the person involved in this case?

A. This is the victim.

[S 20] Q. Is this Susan Lorrine Jones?

A. Yes, sir.

Q. Now, at that same time in Count 2: "The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Ehrlicl Anthony Coker"—his name is spelled Ehrlicl. Is this the same individual here?

A I don't know how his name is spelled, sir, but that is Ehrlich Coker sitting right there with a moustache.

Q. All right (continuing reading): "and Glenn Harlan Stacy with the offense of Rape, for that said accused, in the County of Richmond and State of Georgia, on the 29th day of July, 1972, unlawfully with force and arms, did have carnal knowledge of Susan Lorrine Jones, a female, forcibly and against her will."

Is this the same individual here?

A. That is the same individual that's defendant in this trial that the true bill was returned on that indictment.

Q. Your name appears on the back of this indictment? Is that correct?

A. Gary L. Hull. That's me.

Q. You were the Chief Investigating Officer?

A. Yes, sir; I was.

Q. I'll ask you, Gary, after you made that investigation and found her in the hospital, who did you arrest?

A. I arrested one Ehrlich Coker and I arrested his assistant manager where he was working. He was the manager of the Hudson Oil Company on the Gordon Highway——

MR. BENNETT: (Interposing) If it please the Court, we object to any testimony relative to any other individual that's involved. It's irrelevant and immaterial.

THE WITNESS: I arrested Mr. Coker.

Q. (By Mr. Pritchard) Now, Gary, where was this gentleman actually found?

[S 21] In Taliaferro County, sir.

Q. Were also charges brought in that county against him?

A. Yes, sir; there was.

Q. Now, where did the initial arrest for kidnaping take place?

A. In Richmond County, Georgia.

Q. It is your testimony that he was charged with rape in Richmond County?

A. Yes, sir.

Q. And also kidnaping in Richmond County?

A. That's true.

Q. From there where did he take this Miss Jones?

A. To Taliaferro County on a dirt road located in front—if anybody is familiar with Georgia 78 that goes from Augusta to Atlanta, there is a Georgia work detail type farm which is located on the left going, which would make it the south side of the highway headed west to Atlanta. There is a farm there and you see a lot of State Highway trucks parked, and there's a dirt road there that is very, very lightly traveled. It's got grass grown up, and it's barely worn where the wheels travel. This is where her body was found that morning of the 29th.

Q. Now, were you also the chief investigating officer in Case No. 226 in Taliaferro Superior Court charging Ehrlich Anthony Coker with aggravated assault and rape? Does your name appear on that indictment?

A. Yes, sir; it does.

Q. It would be State's Exhibit No. 5. Now, here it charged him with rape on the 29th day of July of Susan Lorrine Jones in Taliaferro County?

A. Right, sir.

Q. Did your investigation show how many times he raped her in [S 22] that county?

A. Yes, sir; it did. Well, now, I get into hearsay.

Q. Did you actually talk to the defendant himself?

A. Yes, sir.

The Court: Have we identified this defendant as being the same person in that particular case?

Mr. Pritchard: It's spelled "E-h-i-l-i-c-h Anthony Coker."

The Witness: That's the same as the defendant sitting there.

Q. Is that the same person sitting there that's named in this indictment?

A. That's the same fellow.

Q. Now, he was charged on the 29th day of July, 1972, did make an assault upon the person of Susan Lorrine Jones with his fists and a piece of wood approximately 30 inches long, deadly weapons, contrary to the laws of said State, the good order, peace and dignity thereof.

Now, was this growing out of the same circumstances?

A. Yes, sir. There was no break in the event. It traveled from Richmond County into Taliaferro County.

Q. Was the charge of aggravated assault brought by reason of him beating her like this?

A. That's exactly why they were brought.

Q. Now, Officer Hull, have you personally talked with Ehrlich Coker?

A. Yes, sir; numerous times.

Q. Did you read him his rights?

A. Yes, sir; I advised him that he had the right to remain silent. Anything he said could and would be used against him in a court [S 23] of law. He had the right to an attorney present while he was being questioned. If he could not afford an attorney the State would appoint one for him and would pay for this attorney. That while he was talking to me at any time, that he could quit talking to me at any time and advise me that "I want an attorney at this time." I asked him did he understand what I was advising him what his Constitutional rights were, and he said he did. And I further asked him his education, and so forth, and I was very satisfied that he fully understood each and every thing that I explained to him.

Q. Did he make any statement relative to these charges?

A. Yes, he did.

The Court: Is there any objection to this testimony?

Mr. Bennett: Let me ask you this, Mr. Hull:

Q. You said that you were satisfied that he understood these rights?

A. Yes, sir.

Q. Where were you when you asked him that?

A. I'm not trying to be smart or facetious, but at which time?

Q. When he told you he understood it.

A. I did this each time I interviewed him.

Q. All right, let's take the first time.

A. The first time was at where his house was located on George Road, which is located in Augusta, Richmond County, Georgia; and then later that night where I got a statement from him was at the Richmond County jail, which is in Richmond County, Georgia.

Q. Did you get a statement from him at his house on the road?

A. He just said he didn't want to give a statement—"I don't know what you're talking about."

(A conference was had off the record between the Court and counsel.)

[S 24] THE COURT: I will state this for the record: This witness' testimony is going to be restricted to identification purposes, if he can. I will allow you to use this witness to identify the defendant as being the same person as the Defendant in State's Exhibit——

MR. PRITCHARD: That will be 3, 4 and 5.

THE COURT: 3, 4 and 5. And this witness' testimony is restricted to that purpose only.

Q. (BY MR. PRITCHARD) Now, I will ask you further, Officer Hull—you have identified Ehrlich Anthony Coker as being the party charged with aggravated assault on July 29th, 1972, on Susan Lorrine Jones in Taliaferro County?

A. That's correct, sir.

Q. And also the charge of rape under this indictment? Is that correct?

A. That's correct, sir.

Q. He is the same identical person charged with those two crimes?

A. That's correct.

Q. You have full knowledge of that?

A. I have full knowledge.

Q. And you are testifying from your full investigation of this matter?

A. Yes, sir; I am.

Q. Now, as a result of his arrest in Richmond County and

Taliaferro County did you have conversations with him about other things?

A. Yes, sir; I did.

Q. As a result of that conversation——

MR. BENNETT: (Interposing) If it please the Court, we would object to any conversations——

MR. PRITCHARD: I'm not going into the conversation, Mr. [S 25] Bennett.

THE COURT: All right, proceed, gentlemen.

Q. (BY MR. PRITCHARD) As a result of those conversations I'll ask you if charges were brought in Clayton County against him.

A. There was.

Q. Are you familiar with these charges?

A. Yes, sir; I am.

Q. Will you tell me what those charges were?

A. Yes, sir. Kidnaping, rape and murder.

Q. Look at this indictment.

A. This indictment only includes the one count of rape and one count of murder.

MR. BENNETT: May it please the Court, at this time we move the Court for a mistrial because he originally testified that as a result of these charges kidnaping, murder and rape were brought against this defendant, and he's now retracting it and saying, "Well, this is only"—and enumerating the two that he was convicted of.

THE COURT: What was the defendant convicted of under this indictment?

THE WITNESS: This is in Clayton County, Georgia.

THE COURT: State's exhibit what?

THE WITNESS: State's exhibit S-4.

THE COURT: Are you personally familiar with those charges there?

THE WITNESS: Yes, sir.

THE COURT: State's Exhibit 4?

THE WITNESS: Yes, sir.

THE COURT: What are those charges?

THE WITNESS: Murder and rape.

THE COURT: Was the defendant tried on those charges, or did he plead guilty?

[S 26] THE WITNESS: He entered a plea of guilty.

THE COURT: To what?

THE WITNESS: Count 1 and Count 2, which Count 1 is Rape and Count 2 is Murder.

MR. BENNETT: Your Honor, we move for a mistrial.

THE COURT: All right, overruled.

Q. (BY MR. PRITCHARD) In other words, Count 1 is rape—is this Sue Ann Wick the female?

A. Yes, sir; she was.

Q. And the indictment shows also in Count 2 that Sue Ann Wick was murdered?

A. Yes, sir; it does.

Q. And you have photographs and investigation reports in all that?

A. Yes, sir; I do.

MR. BENNETT: If it please the Court, we object—

THE COURT: (Interposing) Objection sustained. We're not going into any photographs.

MR. BENNETT: We respectfully move the Court for a mistrial.

THE COURT: Overruled. Proceed.

Q. (BY MR. PRITCHARD) In other words, your investigation showed these circumstances?

A. Yes, sir.

Q. And your name also appears on this indictment as a witness in the case? Is that correct?

A. Yes, sir; it does.

THE COURT: Have you gone through all the State's Exhibits now?

Q. (BY MR. PRITCHARD) Now, the main verdict against Coker—State's Exhibit No. 4, where he entered a plea of guilty—did you tell me this is the same Ehrlich Coker sitting here that is [S 27] charged and entered this plea in Clayton Superior Court?

A. Yes, sir; it is.

Q. I will ask you here, under State's Exhibit No. 5, is this the same Ehrlich Anthony Coker, or "E-h-i-l-i-c-h" Anthony Coker that pleaded guilty to aggravated assault on Susan Lorrine Jones?

A. Yes, sir; I can.

Q. I will ask you in State's Exhibit No. 5 if this is the same "E-h-i-l-i-c-h" Anthony Coker who pleaded guilty to the offense of rape on Susan Lorrine Jones?

A. Yes, sir; I can.

Q. State's Exhibit No. 3, I'll ask you if this is the same Ehrlich Anthony Coker, or "E-h-r-l-i-c-l" Anthony Coker who was convicted on State's Exhibit 3, indictment in Richmond County for kidnaping [sic] Susan Lorrine Jones?

A. Yes, sir; I can.

Q. I'll ask you can you state in State's Exhibit 3, the 2nd Count, if this is the same Ehrlich Anthony Coker, or "E-h-r-l-i-c-l" Anthony Coker, as spelled, who was charged with the rape of Susan Lorrine Jones in Richmond Superior Court?

A. Yes, sir; I can.

Q. Is this the same person in all of these charges?

A. The defendant seated at that table is the same person as is charged in each indictment that you just read to me.

MR. PRITCHARD: May it please the Court, at this time we will tender into evidence State's Exhibits 3, 4 and 5, which are records we have served upon Mr. Bennett. Witness with you.

MR. BENNETT: Your Honor, we've already stated our objections.

THE COURT: They are admitted in evidence.

(The exhibits referred to were received in evidence.)

[S 28] CROSS EXAMINATION

Q. (BY MR. BENNETT) Mr. Hull, did I understand you to say your name appears on all three of these indictments as investigating officer?

A. Well, I investigated them all. I have not looked at it. I'd rather not make a statement to that effect. I'd like to look at them.

Q. Look at them.

A. My name is on this one.

THE COURT: Mr. Hull, you might identify that for the record.

THE WITNESS: My name is listed on State's Exhibit No. 5. My name is listed on State's Exhibit No. 3; and my name is listed on State's Exhibit No. 4.

Q. (By MR. BENNETT) Mr. Hull, when is the first time you talked to any representative of the Sheriff's Department

here in Ware County or the District Attorney's office of the Waycross Judicial Circuit?

A. Day before yesterday at approximately 4:30 in the afternoon.

Q. That's the first time you had any contact whatsoever from or with them?

A. Yes, sir. That's the first time I knew he had even been arrested.

Q. Day before yesterday—what's the date of that?

A. Well, today is the 22nd. Yesterday was the 21st, and that would be the 20th.

Q. At that time was the decision made for you to come down here and testify?

A. It was that I would come the next day, which was yesterday.

Q. On the 20th the decision was made that you would testify in this case?

A. Well, we didn't discuss whether I would testify. We discussed did I have records, and so forth. I don't remember us discussing [S 29] would I get on the stand. I don't, you know, remember it that way. I was asked to bring records and come down here and see if I could be of assistance to the State.

Q. In other words, you've come and you've testified?

A. Yes, sir; right this minute.

Q. Now, you said, Mr. Hull, I believe, that the indictments on the Richmond County charge and the Taliaferro County charge are the same? Would that mean they grew out of the same transaction?

A. Yes, sir; they do.

Q. You're talking about one victim, aren't you?

A. One victim.

Q. All right, sir. Now, the record shows that in Richmond County he was convicted for the crimes of rape and kidnaping? Is that correct?

A. I'd like to look at it. I probably can get them mixed up.

Q. What are you looking at?

A. All right, I'm looking at State's Exhibit No. 3, and State's Exhibit No. 3 is for kidnaping and rape.

Q. And that's the case of Susan Lorrine Jones?

A. Susan Lorrine Jones.

Q. Did I understand your testimony to be that the actual rape itself took place in Richmond County?

A. It happened in both counties.

Q. It happened in both counties?

A. Yes.

Q. And, then, subsequent to that date, in Taliaferro County, is it not true that two pleas were entered?

A. This is true, sir.

Q. They were entered by Coker, weren't they?

[S 30] A. They were, sir.

Q. Did you have any part in the entry of those pleas?

A. In the entry of the pleas?

Q. Yes. Did you counsel with him about entering pleas?

A. No, sir. His attorney, Mr. O. L. Collins, did this.

Q. Did you have anything to do with it? Did you talk to him about the pleas?

A. No.

Q. Sir?

A. No. There may be a misunderstanding.

Q. Let me ask you this: Did you have any part in any plea bargaining that went on in his behalf?

MR. PRITCHARD: If it please the Court, if Mr. Bennett is going into any plea bargaining and these other things, counsel for the State should have the same right to go into all those facts.

THE COURT: Whatever he goes into, you can go right back into.

THE WITNESS: No, not any plea bargaining. No, sir; I did not.

Q. (BY MR. BENNETT) You had nothing to do with any plea bargaining?

A. No, sir.

Q. There was plea bargaining, wasn't there?

A. That I do not know as a fact. I did not.

Q. Did the defendant Coker testify as a witness in any of those cases in Taliaferro County?

MR. PRITCHARD: If he opens that up, we're going to go into it all the way.

MR. BENNETT: I withdraw the question.

Q. Now, Mr. Hull, where were you working back when you were investigating these cases?

[S 31] A. I was working as an investigator for the Richmond County Sheriff's office in Augusta, Georgia.

Q. And were you working as an investigator for the Rich-

mond County Sheriff's department when you went up to Clayton County in this matter?

A. Yes, sir; I was.

Q. Were you working for the Richmond County Sheriff's Department when you went up to Taliaferro County?

A. Yes, sir; I was.

Q. Did your jurisdiction extend over that far?

A. At that time I was an investigator which on all my documents read for the State of Georgia, which I was a member of the Richmond County Sheriff's Department, but the way I read it, I have arrest authority, and so does any other Sheriff or Deputy Sheriff in the State of Georgia.

Q. Were you a lawful deputy at that time?

A. Yes, sir; I certainly was.

Q. As a matter of fact, wouldn't your arrest authority be confined to the State except in those instances where you observed a crime being committed in your presence?

A. I would certainly think so, sir.

Q. So that just to go and investigate and get hearsays and write out a warrant and go arrest a man, that wouldn't—your authority wouldn't—

A. Outside the County?

Q. That you were deputized in?

A. No, sir; I don't—I think—now, I'm not an authority on this, and I'd rather not make any further statements as to something that I'm not sure of.

THE COURT: Well, I don't see what you're getting into. [S 32] If it's got something to do with this case, go ahead.

MR. BENNETT: Is the Court trying to limit my cross examination?

THE COURT: Tell me what you're getting at. What are you getting at?

MR. BENNETT: I was inquiring into his authority as to what he was doing in these prior cases—his legal authority.

THE COURT: I believe he stated what his authority was—he was an investigator for the Richmond County District Attorney's office. Is that correct?

THE WITNESS: Yes, sir; that's correct.

MR. BENNETT: That's all.

(Witness excused)

J. E. MURRHEE was thereupon called as a witness in behalf

of the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. PRITCHARD) State your name for the record.

A. J. E. Murrhee.

Q. What is your occupation?

A. Sheriff's Department, Ware County.

Q. How long have you been with the Ware County Sheriff's Department?

A. Since 1969.

Q. How long have you been a law enforcer?

A. Twenty-five years.

Q. Captain Murrhee, do you know Ehrlich Anthony Coker?

A. Yes, sir.

Q. Is he in this room?

A. Yes, sir.

Q. Captain Murrhee, did you participate in his actual arrest?

A. In the actual apprehension of the man, no. I talked to him [S 33] after he was arrested.

Q. Where did this take place?

A. Ware County Court House.

Q. What time of the day or night was that?

A. The first time I talked to Mr. Coker was, I'd say, three o'clock in the morning, or two-thirty, or something like that.

Q. At that time was he advised of his rights?

A. Yes, sir.

Q. Did he make any statement to you at that time?

A. He said he had nothing to say—he wanted an attorney.

Q. Now, when was the next time you talked to Mr. Coker?

A. The same day. I would say somewhere around nine or nine-thirty in the morning.

MR. BENNETT: Now, if it please the Court, this is the same evidence we have gone over in the main trial. I can't see where it's leading in this trial.

THE COURT: Well, I don't yet. Maybe we will see. Proceed.

Q. (BY MR. PRITCHARD) Did you talk to him at that time?

A. Yes, sir.

Q. Did you advise him of his legal rights at that time?

A. He was advised of his legal rights again, yes, sir.
Q. At that time what did Mr. Coker state to you?
A. He had nothing to say. He wanted an attorney.
MR. BENNETT: If it please the Court, we object to any confession or anything like that until the State shows it was freely and voluntarily made.
Q. (BY MR. PRITCHARD) You said at that time he had nothing to say. Go ahead and say what he said.
A. He said he had nothing to say, that he wanted an attorney; [S 34] he said he had nothing to lose. He said he already had life imprisonment.

MR. BENNETT: Now, if it please the Court we move the Court for a mistrial. We objected to it on the ground that a proper foundation has not been laid, and then Mr. Pritchard went right ahead and asked him the same question and elicited the answer from him.
THE COURT: Well, I'm not going to grant a mistrial because there's evidence in here of his prior convictions already. But I will sustain the objection to those questions.
MR. PRITCHARD: If it please the Court, he could not testify what he admitted to him, but he is the same person who got these life sentences.
THE COURT: Is that the only purpose?
MR. PRITCHARD: That's the only purpose.
THE COURT: I'm not going to grant a mistrial.
MR. PRITCHARD: Witness with you.
MR. BENNETT: I have no questions.

(Witness excused)

MR. PRITCHARD: May it please the Court, the State rests.
MR. BENNETT: Your Honor, at this time the defense rests, having advised the defendant of all of his rights in respect to his right to testify. The defense rests at this time.
THE COURT: All right, the defense rests.
MR. PRITCHARD: May it please the Court, the State closes.
MR. BENNETT: The defendant closes.

(Evidence closed)

[S 35] (During the argument of Mr. Pritchard the following objections and motions were made:)

MR. PRITCHARD: *** In Count 2, the charge of Rape, the

statutory aggravating circumstances as provided by our law would show that he was found guilty of rape; that the offense of rape was committed by a person with a prior record of conviction of a capital felony. It would also add another statutory ground that the offense of rape was committed while the offender was engaged in the commission of another capital felony, to wit: The armed robbery of Allen Carver, as charged in Count 1 of the indictment. So, you see once again the law of Georgia in the safeguards as set out by the Supreme Court requiring certain other statutory grounds of aggravation. The Georgia law has provided other safeguards for the jury. Upon the trial, the Judge, your Honor, has the right, after the jury recommends death, to grant the defendant a new trial if he sees fit; and an automatic appeal is provided, and the entire Supreme Court of Georgia considers not only was the evidence of guilt established, but also that the evidence warrants the death sentence—
MR. BENNETT: (Interposing) Now, if it please the Court, we feel that the argument of possibility of appeal and the possibility of remission of the sentence—
THE COURT: (Interposing) That has nothing to do with this argument, and I instruct the jury to disregard any such argument.
MR. BENNETT: Your Honor, we move for a mistrial at this time. I believe that taints the jury with the suggestion that—
THE COURT: (Interposing) This is a sentencing phase of the trial now, and anything that the State is arguing has nothing to do with your decision, and I'm not telling you to—I'm directing that you disregard any such argument. It has [S 36] nothing to do with it. You are now here to impose a sentence that this jury sees fit to do under the evidence and under the law, and you will pay absolutely no attention to anything else other than those two criteria I have just told you. Now, proceed.
MR. BENNETT: May we have a ruling on our motion?
THE COURT: Overruled.
MR. PRITCHARD: May it please the Court, I state this for the sole purpose of showing the safeguards—
MR. BENNETT: (Interposing) We renew our motion for mistrial.
THE COURT: Overruled. This has nothing to do with this case, and the jury again is instructed that you are to deter-

mine the sentence in this case and the punishment as it is from the evidence of the first trial and the evidence that has now been introduced to you, and that is the only thing you are to consider. Now, let's do not go into any of that again.

• • •

MR. PRITCHARD: May it please the Court and ladies and gentlemen of the jury, the question of the death penalty—we have to look to see whether capital punishment is a deterrent to crime. Is it a deterrent? This is one of the things that jurors and people, laymen, and lawyers have wondered for a long time; but I ask you when the death penalty was struck down what has happened to crime.

MR. BENNETT: Now, if it please the Court, that's highly improper and prejudicial argument on the part of the State. What has happened to crime has nothing to do with this case, and we object and move the Court for a mistrial.

THE COURT: Overruled. Proceed.

[S 37] MR. PRITCHARD: Look what has happened since the Furman case in 1972. All these crimes have been committed since that time by this same subject. I ask myself and you ladies and gentlemen of the jury—we know every day human life is sacrificed, but you have to determine—the whole argument here is going to be, and I expect to hear these words, "Thou shalt not kill"; but you notice one thing, and I'm going to tell you real quick, and that is this: The State of Georgia and you as citizens have the right to put someone to death. That's what you've got to decide. There was one thing when you walked into this court room—

MR. BENNETT: (Interposing) Now, if it please the Court, I apologize for continuing to interrupt his argument, but he's telling the jury that they are called on to decide the constitutionality of the death sentence, and that's highly improper and misleading and prejudicial argument to make in a closing statement, and we renew our motion for a mistrial. The constitutionality of the statute is not in question, and he's arguing to the jury that they've got to decide whether or not the statute itself is constitutional.

MR. PRITCHARD: I haven't made any such statement. The Supreme Court of Georgia has already had ten cases saying it is constitutional.

THE COURT: That's not a part of what this jury is to consider. I didn't understand him to be arguing that.

MR. BENNETT: If I'm wrong, I apologize. That's what I understood him to be arguing.

MR. PRITCHARD: If it please the Court, eighteen cases have decided that it is constitutional.

THE COURT: Well, let's proceed with the argument.

[S 38] MR. PRITCHARD: *** Mr. Hayes and myself are not just representing Ware County. We are here before you under this indictment, and it calls for the State of Georgia—the people of the State of Georgia; not just you in Ware County, because now in this punishment feature of this thing Ehrlich Coker is charged in Count 1 of Armed Robbery in Ware County; Count 2 of Rape in Ware County; but in your punishment feature he is also charged in Richmond County with what? You will have this indictment out with you from Richmond County for you to consider on his punishment. What did Ehrlich Coker do? He kidnaped one Susan Lorrine Jones on July 29th, 1972, and the Furman case struck down the death penalty in Georgia on June 29th, 1972, and then kidnaping started and he kidnaped a young girl and he took her out in Richmond County and he raped her—

MR. BENNETT: (Interposing) Now, if it please the Court, again I apologize for objecting, but he is introducing now the date of the Furman decision, and that is not a matter that has been brought into evidence in this court, and it's highly improper and misleading argument to the jury, and we move the Court for a mistrial. It has no other effect than to mislead them and to compound a crime, and he's also going back into this area of the things that have happened to crime since the Furman decision, and he's apparently attributing all the crimes in the world to Furman and to this defendant, and we feel like that's improper argument, and I move the Court for a mistrial.

THE COURT: Overruled.

MR. PRITCHARD: Now, he kidnaped a young girl there, and he raped her in Richmond County. You've got this indictment. He was sentenced for life.

MR. BENNETT: If it please the Court, we also object to him arguing specific acts. The Court specifically ruled that the [S 39] only testimony that that man testified to was the fact that this defendant was the man who is charged in that indictment.

THE COURT: Overruled. Proceed.

MR. PRITCHARD: He was tried and convicted for kidnaping

and he was sentenced to life in the penitentiary. In Count 2 for rape of this young girl. You will have that out with you. That's a certified copy of the court records. And he once again took this same young Susan Lorrine Jones over into Taliaferro County, which charged him with aggravated assault on the 29th day of July, 1972. And you draw your own deductions from it. Not only did he rape her, he was charged with aggravated assault upon her, too, and you heard the evidence from Mr. Hull's testimony that when he found her she was unconscious.

MR. BENNETT: Now, if it please the Court, we renew our objection to his arguing specific facts as to how he found that girl, and so forth. The Court specifically ruled that out.

THE COURT: I did rule that out.

MR. BENNETT: We move the Court for a mistrial. That's an inflammatory statement to the jury.

THE COURT: I instruct the jury that they are not to consider any testimony of that particular witness other than just testimony of identification. Proceed.

MR. BENNETT: Is our motion overruled?

THE COURT: Overruled.

• • •

MR. PRITCHARD: I, from the bottom of my heart, would never ask a jury myself to send a man to death if I felt there was one remotest chance of rehabilitation.

MR. BENNETT: Now, if it please the Court, we object to the District Attorney making this into a personal argument and injecting his own opinion as to a probable success of rehabilitation [S 40] as a criteria as to whether or not this jury should apply the death sentence in this case.

THE COURT: Overruled.

MR. BENNETT: We move the Court for a mistrial.

THE COURT: Overruled. Go ahead.

• • •

MR. PRITCHARD: *** I think their only defense is that all he did was tie up Allen Carver and take $20.00 from him; and all he did was rape Elnita Carver in the bed room, and kidnaped her and carried her off; you know he did not hurt her; he did not kill her. But can you say the same thing for Sue Ann Wick?

MR. BENNETT: If it please the Court, he's arguing specific

acts again. The facts of that case were specifically ruled out by this Court, and we move the Court for a mistrial.

THE COURT: Overruled.

• • • •

(During the argument of Mr. Hayes to the jury the following objection and motion were made:)

MR. HAYES: *** The whole county was paralyzed. You've got a convict on the loose. He's raped; he's robbed. Who will be next? Even in Ware County, Georgia, when he told the little girl, "We're going to go find us a woman." Who was that going to be? Whose house in Ware County was he going to hit next? Whose wife was he going to rape next? You know, if they had done what they ought to have done in Clayton County and electrocuted him he wouldn't have been down here raping and robbing in Ware County. If they had done what they should have [S 41] done—

MR. BENNETT: (Interposing) If it please the Court, we object to that. It's improper and misleading and prejudicial argument on the part of the defendant by the District Attorney as to what should have been done in Clayton County. The record speaks for itself. This is only to inflame the minds of the jury against the defendant and prejudice and compound this whole trial. We move the Court for a mistrial.

THE COURT: Overruled.

MR. HAYES: *** Who's next? You know when you close the doors to your home at night and you've got your wife and you've got your little baby, and you think you're safe; and then when your door opens, who's next? You know, the Carvers had never seen him before. It just happened to be the Carvers' house. Who would be next? It could happen to you.

MR. BENNETT: Now, if it please the Court, he's making a self case to the jury. He's pointing to them and threatening them with what could possibly happen at the hands of this defendant, and I believe that is one of the most flagrant examples of improper argument that I've ever heard on the part of the District Attorney, to point to the jury and say, "It's going to happen to you."

MR. HAYES: I didn't say that. I said it could.

MR. BENNETT: He's making a self case out of it, and we move the Court for a mistrial.

THE COURT: Overruled.

[S 42] CHARGE OF THE COURT.

THE COURT: Ladies and gentlemen of the jury, that concludes what we call the presentence hearing. You have heard the additional evidence that has been introduced in this presentence hearing, and you have heard the concluding arguments of the State and the attorney for the defense.

The defendant in this case has been found guilty by this jury of the following charges: Count No. 1: Armed Robbery. Count No. 2: Rape. Count No. 3: Kidnapping. Count No. 4: Motor Vehicle Theft. Count No. 5: Escape.

Now, under the laws of this State you will not concern yourselves with the punishments to be set in Count 3, Kidnaping, Count 4, Motor Vehicle Theft, and Count 5, Escape, but it is your duty now at this time to determine within the limits prescribed by law the penalty which shall be imposed in Count 1, Armed Robbery, and Count 2, Rape.

Under the laws of this State every person found guilty of Armed Robbery shall be punished, 1, by death by electrocution, or, 2, by imprisonment for life, or, 3, by imprisonment for not less than one nor more than twenty years. And under the laws of this State every person found guilty of Rape shall be punished, 1, by death by electrocution, or, 2, by imprisonment for life, or, 3, by imprisonment for not less than one nor more than twenty years.

Now, I charge you that in arriving at your determination and before you can impose the death penalty, you must first determine whether at the time these crimes were committed that one or more of the following statutory aggravating circumstances existed beyond a reasonable doubt.

Now, as to Count 1, wherein the defendant has been found guilty of Armed Robbery, you may consider the following [S 43] aggravting circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed:

1. The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony.

Now, as to Count 2, wherein the defendant has been found guilty of Rape, you may consider one or more of the following statutory aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed under Count 2:

1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony.

2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment.

Now, ladies and gentlemen, as to both counts, in considering whether these offenses were committed by a person with a prior record of conviction for a capital felony, I charge you that capital felony, as used in the penal law, is merely descriptive of those felonies to which the death penalty is affixed as punishment under given circumstances, as distinguish [sic] such felonies from the class in which under no circumstances would death ever be inflicted as a penalty for the violation of the same.

"Capital" is defined as affecting the head or life; incurring or involving the forfeiture of life; punishable with death.

Under the penal laws of this State the death penalty may be imposed for the offense of aircraft hijacking, treason, murder, rape, armed robbery, or kidnapping for ransom; and in considering the prior record of the defendant, you are to determine [S 44] beyond a reasonable doubt as to whether he had been convicted of one of these, regardless of the punishment received.

Now, if you find that one or more of these aggravating circumstances existed beyond a reasonable doubt—and I refer to each individual count—then you would be authorized to consider imposing the sentence of death; but, of course, you are under no circumstances required to impose the death sentence, regardless of any aggravating circumstances.

Now, if you do not find that one of these aggravating circumstances existed beyond a reasonable doubt in either of these counts, then you would not be authorized to consider the death penalty. In that event, the sentence as to Count 1 and Count 2, wherein the defendant was found guilty of Armed Robbery and Rape, you would impose a sentence of imprisonment for life, or recommend that the Judge impose sentence, in which case you recommend that the Judge impose sentence, the punishment that the Judge could impose would be for any term of years from one to twenty years.

Now, the statutory instruction that you are authorized to consider will be submitted in writing to you for deliberation after you go out to the jury room.

In arriving at your determination as to what sentence is appropriate, you are authorized to consider all the evidence received here in court presented by the State and the defendant throughout the trial before you. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Now, mitigating circumstances are those that do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability of [S 45] punishment.

Aggravating circumstances are those which increase the guilt or enormity of the offense or adds [sic] to its injurious consequences.

Now, ladies and gentlemen, the form of your verdict fixing punishment in each count should read: "We, the jury, fix the punishment of the defendant at death by electrocution." Or, "We, the jury, recommend mercy for the defendant," which means life imprisonment. Or, "We, the jury, recommend that the Judge impose sentence," which would mean that punishment would be for any term of years from one to twenty years.

Now, when you reach your verdict it must be unanimous. That is, all twelve jurors must agree before a verdict can be reached.

This you should do separately with each of the counts for which you have found the defendant guilty.

Now, I further charge you that in determining an appropriate sentence in this case it is the duty of the jury to specify whether the sentences on each count of the indictment are to be served concurrently or consecutively. If you determine that the sentences are to be served concurrently, that would mean the defendant would serve the sentences all at the same time. If, on the other hand, you determine that the sentences should be served consecutively, this would mean that the defendant would serve the sentences one after the other, in order. Undess you, the jury, specify that the sentences imposed are to run consecutively, that is, following one another, then they will automatically run concurrently, and will all be served at the same time.

Now, in the event you see fit to specify that the sentence on Count 2 shall follow or run consecutively to the [S 46] sentence on Count 1, add to the form of the verdicts, "We, the jury, recommend that said sentence on Count 2, or Count 1, run consecutively with the other, with the other count," and naming the count. You should also state whether such sentences should run consecutively or concurrently with any sentence the defendant may now be serving or may now be legally imposed on the defendant. Your decision as to what sentence is to be imposed with respect to each count of this indictment must be a unanimous decision.

In addition, the decision as to whether the sentences are to be served concurrently or consecutively must also be a unanimous decision.

In arriving at this determination you will apply the charge of the Court given you in the original case and the charge of the Court now being given you in this presentence hearing; and, again, your verdict should be in writing, should be in ink, and should be signed by your foreman and dated and returned into open court.

Now, the Court will send out with you to the jury room the aggravating circumstances which you will be allowed to consider in making your determination as to whether or not the death penalty is to be imposed. Also, the Court will provide you with a form for your verdict.

Now, the statutory aggravating circumstances which may be considered by the jury in invoking the death penalty are as follows:

As to Count 1, Armed Robbery, 1: The offense of armed robbery was committed by a person with a prior record of conviction for a capital felony.

As to Count 2, Rape: There are two aggravating circumstances that you may consider. 1, The offense of Rape was committed by a person with a prior record of conviction for a [S 47] capital felony. 2, The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to wit: The armed Robbery of Allen Carver, as charged in Count 1 of the indictment.

You will also have this form for the verdict which we will furnish to you to fill out and complete. If you have any difficulty in completing it in any way you will report it back to the Court after you have reached a decision in this case

and we will help you put your verdict in proper form.

You may now retire and consider the sentence in this case.

(After sometime the jury returned into court with a verdict fixing the punishment of the defendant.)

THE COURT: Poll of the jury?

MR. PRITCHARD: Poll of the jury waived by the State.

MR. BENNETT: It is requested by the defendant.

THE COURT: All right, now, as we call your names I ask that you stand and answer yes or no to the following questions: Whether or not the punishment found in Count 1 and Count 2 is your individual verdict, and did you arrive at it freely and voluntarily? You will either answer yes or no.

(As the name of each juror was called by the Clerk that juror answered "Yes.")

THE COURT: I will set for the sentencing of the defendant on all counts, including Count 2, death by electrocution, or the death sentence—all of them on all counts will be set for December 4th at 12:00 o'clock, Noon.

(Case closed)

[State's Exhibit Number One, Presentence Hearing, Ware County Superior Court]

STATE OF GEORGIA : IN WARE SUPERIOR COURT

Vs. : INDICTMENT NUMBER 5097

EHRLICH ANTHONY COKER : CHARGE(S): ARMED ROBBERY, RAPE, KIDNAPPING, MOTOR VEHICLE THEFT, AND ESCAPE

NOTICE TO DEFENDANT OF PRIOR RECORD

TO: E. KONTZ BENNETT, JR., Attorney of Record for:
EHRLICH ANTHONY COKER

NOTICE IS HEREBY GIVEN, as provided by Ga. Ann. Code Sec. 27-2534, (Ga. Laws 1970, pp 949,950; 1971, pp 902), that if the defendant is convicted of the above stated charge(s), that in the pre-sentence hearing regarding the punishment to be imposed, the State will introduce into evidence, the following criminal record of the defendant, to-wit:

DATE	COURT	OFFENSE	SENTENCE
3-12-73	Richmond Superior	Rape Kidnapping	Life 20 yrs. c.s.
4-06-73	Clayton Superior	Rape Murder	20 yrs. Life
5-28-73	Taliaferro Superior	Rape	Life
5-28-73	Taliaferro Superior	Agg. Assault	8 yrs.

DEWEY HAYES, DISTRICT ATTORNEY,
WAYCROSS JUDICIAL CIRCUIT.

BY: M. C. Pritchard
Asst. Dist. Atty.

Georgia, Ware County.

I have this date served a copy of the within notice on the attorney of record for the defendant by
Hand Delivering.

This 4 day of November, 1974.

DEWEY HAYES, DISTRICT ATTORNEY,
WAYCROSS JUDICIAL CIRCUIT.

Filed in Office
this 21st day November 1974
Clerk.

BY: M. C. Pritchard
Asst. Dist. Atty.

[State's Exhibit Number Two, Presentence Hearing Ware County Superior Court]

IN THE SUPERIOR COURT FOR THE COUNTY OF

WARE, STATE OF GEORGIA

CRIMINAL NO. 5097

STATE OF GEORGIA	X	CT. #1 Armed Robbery CT. #2 Rape
VS.	X	CT. #3 Kidnapping CT. #4 Motor Vehicle Theft
EHRLICH ANTHONY COKER	X	CT. #5 Escape

NOTICE OF AGGRAVATING CIRCUMSTANCES

TO: THE JUDGE OF SAID COURT
AND E. KONTZ BENNETT, JR., ATTORNEY OF RECORD:

Pursuant to the provisions of the General Acts and Resolutions, Acts of 1973 Volume 1, pages 164 and 165, Code Section designated by the Acts as 27-2534.1 and other pertinent sections of said Act, the undersigned District Attorney, submits to the Court and said defendant that the State contends and expects to prove in said case that the defendant committed the aforesaid crimes UNDER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, to-wit:

AS TO COUNTS I, II, III, IV, V:

1. Conviction in the Superior Court of Richmond County, State of Georgia, March 12, 1973 for the offenses of Rape and kidnapping.
2. Conviction in the Superior Court of Clayton County, State of Georgia, on April 6, 1973 for the offenses of Rape and Murder.
3. Conviction in the Superior Court of Taliaferror County, State of Georgia, on May 28, 1973 for the offenses of Rape and Aggravated Assault.

AS TO COUNT I - ARMED ROBBERY

1.

The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony. (Ga. Code Sec. 27-2534.1-B-1)

AS TO COUNT II - RAPE

1.

The offense of Rape was committed by a person with a prior record of conviction for a capital felony. (Ga. Ann. Code Sec. 27-2534.1-B-1)

2.

The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to-wit: The Armed Robbery of Allen Carver as charged in Count 1 of the indictment, (Ga. Ann. Code Sec. 27-2534.1-B-2)

WHEREFORE, the undersigned files this notice with the Court and serves a copy hereof, upon the defendant's attorney prior to the trial of the case, all as required by law, this 15th day of November, 1974.

M. C. Pittman
DISTRICT ATTORNEY

FILED IN OFFICE THIS 15 DAY
OF November 1974.
CLERK

[State's Exhibit Number Three, Presentence Hearing, Ware County Superior Court]

IN THE SUPERIOR COURT OF SAID COUNTY.

THE GRAND JURORS selected, chosen and sworn for the County of Richmond . . .

in the name and behalf of the citizens of Georgia, charge and accuse EHRLICL ANTHONY COKER and GLENN HARLAN STACY with the offense of: KIDNAPPING for that said accused, in the County of Richmond and State of Georgia, on the 29th day of July, 1972, unlawfully with force and arms, abduct and steal away SUSAN LORRINE JONES, a person, without lawful authority and warrant and held such person against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

SECOND COUNT

The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia further charge and accuse the said EHRLICL ANTHONY COKER and GLENN HARLAN STACY with the offense of: RAPE for that said accused, in the County of Richmond and State of Georgia, on the 29th day of July, 1972, unlawfully with force and arms, did have carnal knowledge of SUSAN LORRINE JONES, a female, forcibly and against her will,

contrary to the laws of said State, the good order, peace and dignity thereof.

September Term, 1972 Gary L. Hull Prosecutor

R. WILLIAM BARTON, District Attorney

State of Georgia

RICHMOND COUNTY

THE STATE VS. EHRLICH ANTHONY COKER

IN RICHMOND SUPERIOR COURT OF SAID COUNTY JANUARY TERM 19 73

Indictment No. 49
September Term, 1972

SENTENCE

The Defendant Ehrlich Anthony Coker having [redacted] (been found) guilty of the within charge of Rape and Kidnapping at the present Term of the Richmond Superior Court.

IT IS ORDERED. That he be taken to the Jail of said county to await a guard to be sent to the penitentiary of Georgia, where he shall be taken and confined at hard labor therein or elsewhere as the State Department of Correction shall direct for the space of his Natural Life on the charge of Rape, Twenty (20) years on the charge of Kidnapping, said terms to be served consecutively.
Said term to commence from this date.

Said Defendant was represented in this Court by Mr. O. L. Collins, Attorney at Law.

This 12th day of March 1973

J. S. C. A. C.

ATTEST: RICHARD E. ALLEN
[redacted] Augusta Circuit
District Attorney

STATE OF GEORGIA
RICHMOND COUNTY

CLERK'S OFFICE
SUPERIOR COURT

I, Marie E. Garrett, Deputy Clerk of the Superior Court of Richmond County, Georgia, Hereby certify that the foregoing pages are a true copy of the original of file and of record in this office.
Witness my signature and the seal of said Court hereto affixed at Augusta, Georgia, This 21st day of October, 1974.

Deputy Clerk

BEST COPY AVAILABLE

[State's Exhibit Number Four, Presentence Hearing, Ware County Superior Court]

STATE OF GEORGIA, COUNTY OF CLAYTON

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS selected, chosen and sworn for the County of Clayton, . . .

in the name and behalf of the citizens of Georgia, charge and accuse

PHILLIP MICHAEL ECHOLS & EHRLICH A. COKER

with the offense of:—

COUNT I- RAPE. COUNT II-MURDER

for that said accused, in the County of Clayton and State of Georgia, on the

5th day of December, 19 71

COUNT I

did have carnal knowledge of SUE ANN WICK, a female, forcibly and against her wi: contrary to the laws of said State, the good order, peace and dignity thereof,

COUNT II

And the Grand Jurors aforesaid, on their oaths aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse PHILLIP MICHAEL ECHOLS and EHRLICH A. COKER with the offense of MURDER, for that said accused in the County of Clayton and State of Georgia on the 5th day of DECEMBER, 1971, did unlawfully and with malice aforethought kill one SUE ANN WICK, a human being, by stabbing the said SUE ANN WICK with a certain knife, further description of which to the Grand Jurors unknown,

contrary to the laws of said State, the good order, peace and dignity thereof.

William B. Lyon, District Attorney, Clayton Superior Court.

February Term, 19 72

SEAL OF GEORGIA 1776

SENTENCE: (FELONY)

Charge Murder - Rape

Clayton Superior Court

February Term, 1973

No. 7-12,081

THE STATE

vs.

Ehrlich A. Coker

(Plea) [redacted] of Guilty

WHEREUPON, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced.

WHEREUPON, IT IS ORDERED AND ADJUDGED that the Defendant, Ehrlich A. Coker be taken from the Bar of the Court to the Jail of Clayton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Director of Corrections may direct, where the said defendant shall be confined at labor for a full term of 20 twenty years, to be computed according to law,

on Count No. I.

Life Imprisonment on Count No. II, running Consecutively to Count No. I

CLAYTON SUPERIOR COURT

FILED IN OFFICE

This 6 day of April 1973

Jan B Munds

Clerk

By the Court April 6 1973

Harold R. Banke

HAROLD R. BANKE

Judge, Superior Court

Clayton Judicial Circuit

[State's Exhibit Number Five, Presentence Hearing, Ware County Superior Court]

STATE OF GEORGIA. TALIAFERRO COUNTY.

THE GRAND JURORS, selected, chosen and sworn for said County, . . .

In the name and behalf of the citizens of Georgia, charge and accuse

Ehilich Anthony Coker

of the County and State aforesaid, with the offense of aggravated assault

for that the said accused in the County aforesaid, on the 29th day of July

in the year of our Lord Nineteen Hundred and Seventy-Two with force and arms did unlawfully make an assault upon the person of Susan Lorrine Jones with his fists and a piece of wood approximately 30 inches long, deadly weapons, contrary to the laws of said State, the good order, peace and dignity thereof,

COUNT TWO:

And the Grand Jurors aforesaid, on their oaths aforesaid, do further charge and accuse Ehilich Anthony Coker with the offense of rape for that the said accused in the County aforesaid, on the 29th day of July in the year of our Lord Nineteen Hundred and Seventy-Two with force and arms did unlawfully have carnal knowledge of Susan Lorrine Jones, a female, forcibly and against her will,

contrary to the laws of said State, the good order, peace and dignity thereof.

KENNETH E. GOOLSBY,
District Attorney

SPECIAL PRESENTMENT

August Term, Taliaferro Superior Court, 19 72

Count One--Sentence Two

GEORGIA, TALIAFERRO COUNTY.

STATE OF GEORGIA
vs.
EHILICH ANTHONY COKER

In Superior Court of Said County,
May Term, 1973
Indictment for AGGRAVATED ASSAULT
Plea of Guilty.

WHEREUPON it is adjudged by the Court that the Defendant Ehilich Anthony Coker be remanded to the common jail of this County and there safely kept till a guard shall be sent from the Penitentiary of this State by the State Board of Penal Corrections, and then delivered to said State Board of Penal Corrections and said Defendant Ehilich Anthony Coker be imprisoned in said Penitentiary—at State Farm, or elsewhere in the State, as the State Board of Penal Corrections may direct, for and during the full term of Eight (8) years at the expiration of sentence number one, to be computed until fully completed, provided, however, shall said convict file a motion for new trial, or shall adopt any other procedure to stay this said sentence, then and in that event the sentence to be computed from the date of his delivery to the warden of the Penitentiary under this sentence.

It is further ordered that the Clerk of this Court inform the State Board of Penal Corrections immediately, by mail or otherwise, of this conviction and sentence, and that said convict be detained in said jail, subject to their order.

Judgment signed and filed this 28th day of May 1973

KENNETH E. GOOLSBY,
District Attorney

Judge Superior Court Toombs Circuit.

Count Two--Sentence One

GEORGIA, TALIAFERRO COUNTY.

STATE OF GEORGIA • In the Superior Court of Taliaferro County, Georgia
VS. • May Term, 1973
EHILICH ANTHONY COKER • Indictment for rape--Plea of guilty

WHEREUPON, the Defendant having entered his plea of guilty for the offense of RAPE, it is considered, sentenced and adjudged by the Court that the Defendant EHILICH ANTHONY COKER be remanded to the common jail of Taliaferro County and there safely kept until a guard be sent from the Penitentiary of this State Board of Penal Corrections and then delivered to said State Board of Penal Corrections and said Defendant EHILICH ANTHONY COKER be imprisoned in said Penitentiary--at State Farm, or elsewhere in the State, as the State Board of Penal Corrections may direct, for and during the remainder of his natural life, he being hereby sentenced to life imprisonment in said Penitentiary.

IT IS FURTHER ORDERED that the Clerk of this Court inform the State Board of Penal Corrections immediately, by mail or otherwise, of this conviction and sentence, and that said convict be detained in said jail, subject to their order.

Judgment signed and filed this 28th day of May, 1973.

Judge Superior Court, T. J. C.

KENNETH E. GOOLSBY
District Attorney

[Trial Court's Written Sentencing Instructions to Jury]

STATUTORY AGGRAVATING CIRCUMSTANCES

The following Statutory Aggravating Circumstances may be considered by the jury in invoking the death penalty, as the Court has given you in charge.

AS TO COUNT I - Armed Robbery

1.

The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony.

AS TO COUNT II - Rape

1.

The offense of Rape was committed by a person with a prior record of conviction for a capital felony.

2.

The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to-wit: The Armed Robbery of Allen Carver as charged in Count 1 of the indictment.

[Punishment Verdict: Count One]

PUNISHMENT VERDICT

COUNT 1 - ARMED ROBBERY

We, the Jury, recommend and fix the defendant's Punishment in Count 1, for Armed Robbery, as follows:

1. ~~Death By Electrocution~~
2. Recommend Mercy For The Defendant
3. ~~Recommend That The Judge Impose Sentence~~

If death is recommended and fixed as punishment, complete the following:

We further find the following aggravating circumstances:

This 22 day of Nov., 1974.

Ruric Joyner
FOREMAN

[Punishment Verdict: Count Two]

PUNISHMENT VERDICT

COUNT 2 - RAPE

We, the Jury, recommend and fix the defendant's Punishment in Count 2, for Rape, as follows:

1. Death By Electrocution
2. ~~Recommend Mercy For The Defendant~~
3. ~~Recommend That The Judge Impose Sentence~~

If death is recommended and fixed as punishment, complete the following:

We further find the following aggravating circumstances:

1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony.

2. The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to-wit: The Armed Robbery of Allen Caves as charged in Count I of the indictment.

This 22 day of Nov., 1974.

Ruric Joyner
FOREMAN

[Sentence: Count One]

STATE OF GEORGIA

Vs.

Ehrlich Anthony Coker

DEFENDANT

( ) CASE NUMBER 5097

( ) INDICTMENT FOR Armed Robbery

( ) IN WARE SUPERIOR COURT

( ) April Term, 1974

( ) VERDICT ~~PLEA OF GUILTY~~

Count #1

WHEREUPON, it is ordered and adjudged by the Court that the Defendant Ehrlich Anthony Coker be taken from the Bar of the Court to the jail of said County, and be there safely kept until a sufficient guard is sent for i the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the of Corrections may direct, where he, the said Defendant, shall be confined at labor for a term

_____ (Months) Life

to be computed (according to law).

This 4 day of December

Judge, Superior Courts,
Waycross Judicial Circuit.

M. C. Rutherford

D. District Attorney.

FILED THIS 4 DAY OF December, 1974 12:2

(CLERK) ~~(DEPUTY CLERK)~~ WARE SUPERIOR COURT

[Sentence: Count Two]

DEATH SENTENCE - COUNT TWO

WHEREAS, the Jury trying the above case having returned a verdict on Count 2 on the charge of Rape as follows: We, the Jury find the defendant guilty of Count 2. This 21 day of November, 1974, Foreman: Auvie Joyner.

AND WHEREAS, the jury in the presentence hearing returned the following punishment verdict: We, the Jury, recommend and fix the defendant's punishment in Coount 2, for Rape, as follows: Death by Electrocution." We further find the following aggravating circumstances: 1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to-wit: The armed robbery of Allen Carver as charged in Count 1 of the indictment." This 22 day of November, 1974, Foreman: Auvie Joyner.

WHEREAS, the Jury in the above stated case having found the defendant, Ehrlich Anthony Coker, guilty in Count Two of Rape, and having set his punishment at Death by Electrocution, therefore same is hereby made the Judgment of the Court,

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, Ehrlich Anthony Coker, be taken from the Bar of this Court to the common jail of Ware County or to some other safe and secure place under such guard and protection as may be deemed necessary where he shall be safely and securely kept until his removal therefrom to the custody of the Director of the State Department of Corrections, for the purpose of the execution of this sentence in the manner prescribed by law.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that on the 6th day of January, 1975, the defendant, Ehrlich Anthony Coker, shall be executed by the Director of the State Department of Corrections at such penal institution as may be designated by said Director, and witnessed only by the executing officer, defendant's relatives, counsel and such clergymen and friends as he may desire.

IT IS FURTHER ORDERED that the Sheriff of Ware County, together with such Deputies as he may deem necessary, the number of guards to be approved by the presiding Judge, shall convey and deliver the said Ehrlich Anthony Coker to the Director of the State Department of Corrections at such penal institution as may be designated by said Director, as provided by law.

AND IT IS FURTHER ORDERED that the said defendant, Ehrlich Anthony Coker, on the day fixed herein between the hours of 10:00 o'clock A.M. and 2:00 o'clock P.M., be by the Director of theState Department of Corrections electrocuted at the time and place and in the manner herein provided by law.

And May God have mercy upon your soul.

AND IT IS SO ORDERED THIS 4th day of December 1974.

JUDGE, WARE SUPERIOR COURT, PRESIDING

DEWEY HAYES
DISTRICT ATTORNEY
BY: W. C. Sutchard
Asst. Dist. Attorney

FILED IN OFFICE THIS 4 DAY OF Dec. 1974.
CLERK

[Sentence: Count Three]

STATE OF GEORGIA

Vs.

Ehrlich Anthony Coker

DEFENDANT

( ) CASE NUMBER 5097

( ) INDICTMENT FOR Kidnapping (Count 3)

( ) IN WARE SUPERIOR COURT

( ) April Term, 1974

( ) VERDICT - ~~NO PROSECUTION~~

WHEREUPON, it is ordered and adjudged by the Court that the Defendant Ehrlich Anthony Coker be taken from the Bar of the Court to the jail of said County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said Defendant, shall be confined at labor for a term

_____ (Months) Twenty (20) (Years)

to be computed (according to law). to run consecutive with Count #1, Indictment #5097

This 4 day of December, 1974

Judge, Superior Courts,
Waycross Judicial Circuit.

W. C. Sutchard

District Attorney.

FILED THIS 4 DAY OF December, 1974, 12:07 P.M. O'Clock

(CLERK) (DEPUTY CLERK) WARE SUPERIOR COURT

[Sentence: Count Four]

STATE OF GEORGIA

Vs.

Ehrlich Anthony Coker

DEFENDANT

( ) CASE NUMBER 5097

( ) INDICTMENT FOR Motor Vehicle Theft

( ) IN WARE SUPERIOR COURT

( ) April Term, 197 4

( ) VERDICT ~~GUILTY/NOLO CONTENDERE~~

Count #4

WHEREUPON, it is ordered and adjudged by the Court that the Defendant Ehrlich Anthony Coker be taken from the Bar of the Court to the jail of said County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said Defendant, shall be confined at labor for a term

(Months) Seven (Years)

to be computed (according to law). to run consecutive to Count #3 in Indictment #5097.

This 11 day of December, 197 4

Judge, Superior Courts,
Waycross Judicial Circuit.

and M.C. Pritchard
District Attorney.

FILED THIS 4 DAY OF December, 197 4 12:16 P.M.
O'Clock

(CLERK) (~~DEPUTY CLERK~~) WARE SUPERIOR COURT

[Sentence: Count Five]

STATE OF GEORGIA

Vs.

Ehrlich Anthony Coker

DEFENDANT

( ) CASE NUMBER 5097

( ) INDICTMENT FOR Escape

( ) IN WARE SUPERIOR COURT

( ) April Term, 197 4

( ) VERDICT ~~GUILTY/NOLO CONTENDERE~~

Count #5

WHEREUPON, it is ordered and adjudged by the Court that the Defendant Ehrlich Anthony Coker be taken from the Bar of the Court to the jail of said County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said Defendant, shall be confined at labor for a term

(Months) Five (Years)

to be computed (according to law). to run consecutive with Count #4, Indictment #5097.

This 11 day of December, 197 4

Judge, Superior Courts,
Waycross Judicial Circuit.

and M.C. Pritchard
District Attorney.

FILED THIS 4 DAY OF December, 197 4 12:16 P.M.
O'Clock

(CLERK) (~~DEPUTY CLERK~~) WARE SUPERIOR COURT

[Trial Judge's Capital Sentencing Report] CODE

— Report of The Trial Judge

of the

Superior Court of Ware County, Georgia

The State vs. Erlich Anthony Coker

(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name COKER ERLICH ANTHONY 2. Date of Birth March 31, 1949
   Last, First Middle Mo. Day Year
3. Social Security Number 255 80 4490
4. Sex: M [x] 5. Marital Status: Never Married [ ]
   F [ ] Married [X] Present Status Unknown.
   Divorced [ ]
   Spouse Deceased [ ]
6. Children
   (a) Number of children one
   (b) Ages of children: 1 2 (3) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 15-
   (Circle age of each child)
7. Father living: yes [X] no [ ] If deceased, give date of death ____
8. Mother living: yes [X] no [ ] If deceased, give date of death ____
9. Number of children born to parents Four
10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 (10) 11 12 13 14 15 16 17
    (Circle one) [college]
11. Intelligence Level: (IQ below 70) Low [ ]
    (IQ 70 to 100) Medium [X]
    (IQ above 100) High [ ]
12. Psychiatric Evaluation Performed? Yes [X] No [ ]
    If performed is defendant:
    a. Able to distinguish right from wrong? [X] [ ]
    b. Able to adhere to the right? [X] [ ]
    c. Able to cooperate intelligently in his own defense [X] [ ]
13. If examined, were character or behavior disorders found? Yes [X] No [ ]
    (If answer is yes please elaborate) Defendant examined by Dr. J. F. Casey at at Ga. Diagnostic Center on Nov. 15, 1973, found to be competent, but Diagnosis Anxiety Neurosis 300.0. Defendant also examined by Dr. C. M. Johnson on Nov. 13, 1974, who's diagnosis and examination was inclusive [sic].
14. What other pertinent psychiatric [and psychological] information was revealed?

    Defendant filed a plea of insanity which was tried by a jury. Defendant was found competent, November 19, 1974.

15. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	U. S. Army	Unkn	8/20/67 to 9/15/70	Discharge
b.	Super Sonic Car Wash	Unkn	Unkn	Unkn
c.	Hudson Oil Company	Unkn	Unkn	Arrested for Rape
d.				
e.				

*A separate report must be submitted for each defendant sentenced to death.

B. Data Concerning the Trial

1. Was the case tried with or without jury? With [X] Without [ ]
2. How did the defendant plead? Guilty [ ] Not guilty [X]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:
   a. Treason.....[ ]
   b. Murder.....[ ]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results.....[ ]
   e. Aircraft Hijacking.....[ ]
   f. Rape.....[X]
   g. Armed Robbery.....[ ]
2. Were other offenses tried in the same trial? yes [X] no [ ]

   If other offenses were tried in the same trial list those offenses.

   a. Armed Robbery
   b. Kidnapping
   c. Motor Vehicle Theft
   d. Escape
3. If tried with jury, did the jury recommend the death sentence? Yes [X] No [ ]
4. Statutory aggravating circumstances found: Yes [X] No [ ]
5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, (rape), armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or (2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[X]	[X]
	[ ]	[ ]
b. (1) The offense of murder, (rape), armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery or (2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[X]	[X]
	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

BEST COPY AVAILABLE

	Instructed	Found
d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[ ]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List non statutory aggravating circumstances indicated by the evidence, if any.

a. Defendant raped victim and took her hostage.

b. _____

c. _____

d. _____

7. Was there evidence of mitigating circumstances? Yes [ ] No [x]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity. [ ]

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [ ]

d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. [ ]

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other. [ ]
Please explain if (i) is checked None

9. If tried with a jury, was the jury instructed to consider the circumstances indicated in 8 as mitigating circumstances? Yes [ ] No [X]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [X]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [X] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [x]

13. If answer is yes, what was the relationship? _____

14. Was the victim an employer or employee of defendant? No [x]
Employer [ ]
Employee [ ]

15. Was the victim accusinted with the defendant? No [X]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community? Resident [X]
Transient [ ]

17. Was the victim the same race as defendant? Yes [x] No [ ]

18. Was the victim the same sex as the defendant? Yes [ ] No [x]

19. Was the victim held hostage during the crime? No [ ]
Yes - Less than an hour [ ]
Yes - More than an hour [x]

20. Was the victim's reputation in the community: Good [ ]
Bad [ ]
Unknown [x]

21. Was the victim physically harmed or tortured? Yes [ ] No [x]
If yes, state extent of harm or torture: _____
Victim was raped, and taken hostage, but no physical torture.

22. What was the age of the victim? 16

23. If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument Knife	[X]
Firearm	[ ]
Other Board, 1X2, 35 inches long	[X]

24. Does the defendant have a record of prior convictions? Yes [X] No [ ]

25. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

	Offense	Date of Offense	Sentence Imposed
	Rape	July 29, 1972	Life
a.	Kidnapping	July 29, 1972	20 Yrs. Consec.
	Rape	July 29, 1972	Life
b.	Aggravated Assault	July 29, 1972	8 Yrs. Consec.
	Murder	Dec. 5, 1971	Life
c.	Rape	Dec. 5, 1971	20 Yrs. Consec.
d.			

26. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [X]

27. Was the defendant a local resident or transient in the community?
Escapee from Ware Correc. Institute - Resident [ ] Transient [X]

D. Representation of Defendant *

1. Date counsel secured September 3, 1974

2. How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [X]

3. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [X]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____ [ ]

4. How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10 [X]
c. over 10 [ ]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [ ]
Public Defender: - c. Mostly criminal [X]

6. Did the same counsel serve throughout the trial? Yes [X] No [ ]

7. ~~xxxxxxxxxxxxxxxxxx~~ E. Kontz Bennett, Jr., Public Defender for the Waycross Judicial Circuit was assisted by Assistant Public Defender, C. D. Strickland.

* (If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [X]

3. What percentage of the population of your county is the same race as the defendant?
a. Under 10%.....[ ]
b. 10 to 25%.....[ ]
c. 25 to 50%.....[ ]
d. 50 to 75%.....[ ]
e. 75 to 90%.....[ ]
f. Over 90%.....[ ]

4. Were members of defendant's race represented on the jury? Yes [X] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [X]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [X]

7. Was there extensive publicity in the community concerning this case? Yes [ ] No [X]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [X]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [X]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [X]

11. If answer is yes, what was that evidence? _____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case Defendant was fully represented by capable & effective attorneys & in my opinion he received a fair trial with all of his Constitutional rights fully protected

Defendant was fully represented by capable & effective attorneys. In my opinion he received a fair trial with all his constitutional rights fully protected.

F. Chronology of Case

		Elapsed Days
1.	Date of Offense September 2, 1974	
2.	Date of Arrest September 3, 1974	1
3.	Date Trial Began November 19, 1974	46
4.	Date Sentence Imposed By Jury November 22, 1974	49

5. Date post trial motions ruled on 11-19-74 — 46

6. Date Trial Judge's Report Completed 12-4-74 — 61

Date Sentence by the Court 12-4-74 — 61

7. *Date Received by Supreme Court _____

_____

8. *Date Sentence Review Completed _____

_____

9. *Total Elapsed Days _____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments ( )
3. He has not responded X

December 4, 1974
Date

Elie L. Holton
Judge, Superior Court of

Ware County

Elie L. Holton
Judge, Superior Courts,
Waycross Judicial Circuit
(P. O. Box 604
Douglas, Ga. 31533)

FILED IN OFFICE THIS 4 DAY
OF December 1974.
Bill Branch CLERK

[Notice of Appeal]

NOTICE OF APPEAL

Notice is hereby given that Ehrlich Anthony Coker defendant above named hereby appeals to the Supreme Court from the judgment over ruling defendant's amended motion to quash entered herein on December 2, 1974 and from the judgment over ruling defendant's motion to sever entered herein on December 2, 1974 and from the judgment over ruling defendant's demurrer as amended entered herein on December 2, 1974 and from the judgment over ruling the defendant's special plea of insanity entered herein on December 2, 1974 and from the judgment of conviction and sentence entered herein on December 4, 1974.

The offenses for which defendant was convicted and the sentences imposed thereon are as follows:

Count One: Armed robbery, life imprisonment, consecutive;
Count Two: Rape, death by electrocution;
Count Three: Kidnapping, 20 years imprisonment, consecutive;
Count Four: Motor Vehicle theft, 7 years imprisonment, consecutive;
Count Five: Escape, 5 years imprisonment, consecutive.

The clerk will please omit the following from the record on appeal: None.

Transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

This Court, rather than the Court of Appeals, has jurisdiction of this case on appeal for the reason that the death penalty was given.

Dated: December 4, 1974.

E. Konts Bennett, Jr.
Attorney for Defendant

[Clerk's Notice of Appeal]

CLERK'S NOTICE

WARE SUPERIOR COURT

DOCKET NUMBER - 5097

EHRLICH ANTHONY COKER, DEFENDANT

E. KONTZ BENNETT, JR., ATTORNEY FOR DEFENDANT

PUBLIC DEFENDER

WARE COUNTY COURTHOUSE

WAYCROSS, GEORGIA, 31501

On the 22 day of November, 1974, the defendant, Ehrlich Anthony Coker, was duly tried and convicted by a panel of 12 jurors of the following offenses: Armed Robbery, Rape, Kidnapping, Motor Vehicle Theft and Escape. As to the offense of rape, the jury recommended that the defendant be punished by death by electrocution. The jury in making this recommendation found that the offense of rape had been committed by the defendant while he was engaged in committment of another capital felony offense, to-wit: Armed Robbery and that the offense of rape was committed by the defendant who had a prior record of conviction for capital felony, this being considered an aggravated circumstance under Code Section 27-2534.1. Upon the recommendation by the jury, the Honorable Elie L. Holton set the sentencing date for the imposition of the sentence for the 4 day of December, 1974. Judge Holton imposed sentence for the defendant to be death by electrocution on the 6 day of January, 1975, between the hours of 10:00 A.M. and 2:00 P.M.

CLERK SUPERIOR COURT
WARE COUNTY, GEORGIA

[Appellate Affidavit of Indigency]

Personally appeared before the undersigned officer duly authorized by law to administer oaths, Ehrlich Anthony Coker, who being first sworn, deposes and says that he is without funds or property sufficient to pay the cost of the prosecution of an appeal of his conviction in the Superior Court of Ware County, Georgia. This affidavit is made in order that his appeal from said conviction may proceed without prepayment of costs.

This 4th day of December, 1974.

Ehrlich Anthony Coker

Sworn to and subscribed
before me this 4 day
of December, 1974.

Notary Public

[Opinion of the Supreme Court of Georgia: Ehrlich Anthony Coker v. The State (two cases) Nos. 29758, 30006 234 Ga. 555, 216 S.E.2d 782 May 20, 1975 Rehearing Denied June 17, 1975]

E. Kontz Bennett, Jr., Public Defender, Dennis J. Strickland, Waycross, for appellant.

M. C. Pritchard, Waycross, Dewey Hayes, Dist. Atty., Douglas, Arthur K. Bolton, Atty. Gen., Julius C. Daugherty, Jr., Asst. Atty. Gen., Atlanta, for appellee.

Syllabus Opinion by the Court

INGRAM, *Justice*.

The case of the appellant, Ehrlich Anthony Coker, is before this court by direct appeal and for mandatory review of the death sentence received at trial. The crimes which appellant was charged with committing occurred on September 2, 1974; indictments were returned against him on October 18, 1974; and, a trial on appellant's special plea of insanity was held on November 19, 1974. The appellant was found competent to stand trial and his trial on the general issue got under way on November 20, 1974, resulting in sentences imposed December 4, 1974. A majority of the court find no reversible error and affirm the convictions and sentences. We agree with the trial judge that "[d]efendant was fully represented by capable and effective [counsel] . . . and received a fair trial . . ."

The appellant was convicted of armed robbery and sentenced to life imprisonment; he was convicted of rape and sentenced to death; he was convicted of kidnapping and sentenced to 20 years; he was convicted of motor vehicle theft and sentenced to seven years; and he was convicted of escape and sentenced to five years.

I

Summary of the Evidence

The prosecution presented evidence which established the following: On the evening of September 2, 1974, around 7:30 P.M., several inmates attended a meeting of Alcoholics Anonymous in the chapel of the Ware County Correctional Institution. Around 8:10 P.M., an inmate, brandishing a five or six-pound steel bar, announced, "Be still . . . this is an escape." The supervisor of the meeting, Corrections Counselor George Shiver, requested that the inmates who were not involved be allowed to get behind the counselor. Several inmates complied with the counselor's request.

At this point, three inmates, including the appellant, began tearing through a plywood ceiling with the steel bar. A few minutes later, Warden Bruce Brown discovered that the inmates had torn through the roof of the chapel, gone across the building to an area not enclosed by the prison fence, and jumped off another building into the woods adjoining the prison grounds.

Later the same evening, around 11:00 P.M., a man dressed in prison clothes suddenly came through the back door of the home of 16-year old Allen David Carver. Carver was in the kitchen with his wife while his three-week-old son was in a bedroom asleep. The intruder swung a board toward and close to Allen Carver.

Mr. Carver identified the appellant as the man who broke into his home. Appellant ordered Carver's wife to tie up her husband and she tied his hands and feet. The appellant then tied Carver to the bathroom shower rod with Carver's belt. Appellant confiscated Carver's wallet, clothes, money totaling $20.30 and keys. Subsequently, appellant gagged Carver with his wife's underpants. When appellant was not using the board to intimidate the young couple, he used a four-inch steak knife which he took from Mrs. Carver.

After appellant had bound and gagged Allen Carver in the bathroom, the appellant raped Mrs. Carver. At the time, Mrs. Carver was physically weak, having recently left the hospital following childbirth, and appellant was told this information. After appellant completed the rape he inquired and was told how to crank the Carvers' car.

Appellant then forced Mrs. Carver to accompany him in the car and made her sit directly next to him while effecting an escape from the locale. Before appellant left with Mrs. Carver, he told her husband, whom he left bound and gagged, ". . . I'm taking her with me. If you get loose and call the police, your wife is going to be dead." Appellant was apprehended in the Carver car by police officers several hours later and Mrs. Carver was released. Appellant was still carrying the knife which he took and used in the commission of the crimes.

II

Enumerations of Error

In his attack on the conviction and sentence in case No. 29758, appellant asserts 79 enumerations of error. These enumerations will be grouped, where appropriate, as applicable legal principles are common to more than one enumeration.

1. In enumerations 1, 3 and 4, appellant alleges improper joinder for trial of the charges of escape and motor vehicle theft with the other charges contained in the indictment.

[1] The recent case of *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (decided April 29, 1975) addressed this issue. In a case where "[f]rom the nature of the entire transaction it would be almost impossible to present to a jury evidence of one of the crimes without also permitting evidence of the other crimes to be introduced since they were all a part of one continuous transaction covering a period of [several] hours," *Henderson v. State*, 227 Ga. 68, 76(1), 179 S.E.2d 76; *Owens v. State*, 233 Ga. 905, 213 S.E.2d 860 (decided March 4, 1975), and "Two or more offenses . . . are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan" (*Dingler v. State*, 233 Ga. 462, 463, 211 S.E.2d 752, 753), the

joinder of the several crimes is not error. Code Ann. § 26–506.

In the present case, the motor vehicle was taken to perfect the appellant's escape and was used as an instrument of the kidnapping while fleeing from the scene of the rape and robbery. The trial judge did not abuse his discretion in denying the severance "in the interest of justice." We find no error here.

2. In enumeration 2, appellant alleges the trial court erred in overruling appellant's written motion to quash the indictment.

[2] In his motion, appellant made a general attack on the constitutionality of the Georgia Death Penalty Statute, Ga.L.1973, pp. 159, 163 (Code Ann. § 27–2534.1). This statute has been repeatedly upheld by a majority of this court. See *Coley v. State*, 231 Ga. 829, 833, 204 S.E.2d 612; *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12; *Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668; *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (decided April 9, 1975). We affirm those rulings here.

Additionally, appellant attacks the armed robbery statute, Code Ann. § 26–1902, the rape statute, Code Ann. § 26–2001 and the kidnapping statute, Code Ann. § 26–1311 as being unconstitutionally vague, indefinite, discretionary and overbroad so as to violate due process and equal protection clauses of the Georgia and United States Constitutions.

[3] Neither at trial nor before this court has appellant supported these contentions with persuasive argument or authority. We have read the statutes and believe they properly appriše a defendant of the charge he must defend against and are sufficient to protect him from double jeopardy. We affirm the trial court's ruling.

[4] Appellant objected to Count 5 (escape) because it stated and described each and every charge of which the defendant stood convicted. This objection was recognized by the trial court in that a stipulation subsequently was entered into which stated only that the defendant "has prior to this time and prior to the date on which he was charged with escape, been convicted of a prior felony, and was at the time of the alleged escape in lawful confinement in the Ware Correctional Institution."

There is no merit to this enumeration even if we assume the initial objection had merit.

3. In enumeration 3, appellant alleges the trial court erred in refusing to admit into evidence at the special plea of insanity trial the summary of a doctor's report of examination of the appellant.

There is only a bare allegation in appellant's brief that it was harmful for the trial court to refuse to admit into evidence the summary of Dr. Johnson, the appellant's psychiatrist, containing his report of examination and recommendations of the condition of the appellant at the time of the commission of the alleged criminal acts and at the time of trial.

[5] All of the doctor's findings could be elicited on direct examination. The doctor was a witness at the trial. To admit his report in evidence would bolster his testimony by providing a written memorandum of his testimony for the jury not permitted in the case of other witnesses. Additionally, admission of the summary into evidence would have been cumulative and repetitive of the witness's testimony which appears to have been full and exhaustive concerning his findings as a result of the examination he made of appellant. In the absence of any showing of injury this bare claim of error presents nothing for review. *Brown v. Atlanta*, 66 Ga. 71; *Robinson v. State*, 229 Ga. 14, 16, 189 S.E.2d 53.

4. In enumerations 6, 7, 8, 9, 18, 21 and 41, appellant alleges error in the admission of specific opinion evidence which he characterizes as "conclusory statements" or incompetent evidence. Some of the statements occurred during the special plea of insanity trial and others occurred during

the trial of the general issue. The statements in dispute are as follows:

[6] a(6). Allowing the defense psychiatrist to discuss the "M'Naughton case" is alleged as error in that it affected the credibility of the witness because of the poor quality of his response.

The transcript shows defense counsel initiated the discussion of appellant's ability to distinguish right and wrong on direct examination in the special plea trial although this was not an issue in that trial. See *Brown v. State*, 215 Ga. 784(1), 113 S.E.2d 618 for an expression of the test of competency to stand trial. As we read the testimony, the cross-examination concerning the McNaghten test was a proper effort by the district attorney to demonstrate the irrelevance of the right and wrong issue in the special plea trial. No error appears.

[7, 8] b(7). Although appellant's objection to the opinion testimony of a police officer, that appellant gave ordinary and reasonable answers to ordinary questions, was sustained, appellant now objects because the court failed thereafter to instruct the jury about it. Part of appellant's sustained objection was that, "He can state what the response would be and let the jury decide." The action of the trial judge in sustaining the objection indicated agreement with the position of defense counsel. In the absence of a timely request, opinion evidence does not require an instruction as to weight. *Vandable v. State*, 127 Ga.App. 306(2), 193 S.E.2d 197. Subsequent questioning established a basis for the conclusion. If the facts are given on which opinions are based, laymen are competent to give opinions on a person's mental condition. *Strickland v. State*, 137 Ga. 115(4), 72 S.E. 922; *Proctor v. Pointer*, 127 Ga. 134(2), 56 S.E. 111.

[9] c(8). Appellant argues the trial court erred in overruling his objection to a "conclusory" statement of Officer Gerald Murhee, as to whether appellant knew the identity of the officer.

Prior to the objected to statement, Officer Murhee testified that on the day prior to the day he stated appellant knew him, he (Officer Murhee) "advised Mr. Coker as to who I was, and I advised him of his rights, and I asked him some questions." Under these circumstances, the facts underlying the witness's conclusion were stated and we find no error.

[10] d(9). The trial court properly overruled appellant's objection to the testimony of Warden Bruce Brown of Ware Correctional Institution that the appellant was "as normal as any other inmate." The warden testified he was in daily contact with appellant from the early part of the year, that he observed him day in and day out and talked to him occasionally and couldn't tell any change in him.

[11] (e)(18). Appellant's contention that the court erred in overruling his objection and allowing the witness Shiver to testify that prisoner Brinks "was talking loud enough where all the inmates and I could hear" is without merit. Witness Shiver, a correction officer for five years was supervising an Alcoholics Anonymous meeting in the chapel with about 33 persons present. His statement "all the inmates" obviously referred to all of the inmates present in the chapel, a room approximately 18 x 24 feet, and not all of the inmates in the institution.

[12] f(21). Appellant alleges, "The court erred in permitting the witness Shiver to testify that, '. . . there were nine inmates left at this time, and I asked them again if they were not involved to get behind me, . . .' where a Ware County Superior Court jury had immediately prior to the present case, acquitted three of these same nine defendants on charges of mutiny in a penal institution." The appellant was charged with escape—not with mutiny—and this testimony was admissible to show appellant had an opportunity to disassociate himself from the escape. Any action on charges of mutiny was irrelevant to any

issue before the trial court in appellant's case.

[13] 6(41). Enumeration 41 was not argued by appellant in his appeal and is considered abandoned. Rule 18(c)(2), Supreme Court.

[14] 5. Enumerations 10, 11, 12, 13 and 14 concern instructions given, or the denial of requested instructions, during the trial of the special plea of insanity.

The instructions objected to were:

"Now, I charge you that the burden rests upon the moving party, that is, Coker, the defendant, to satisfy the jury of the truth of his case by a preponderance of the evidence."

"Now, where in the opinion of the jury the evidence is equally balanced upon each side, where the jury believe the witnesses on each side equally credible, where the jury believes the evidence is as strong on one side as the other, then a preponderance of the evidence would not be carried, and in such case it would be the duty of the jury to return a verdict in favor of the State in this case."

"I further charge you, ladies and gentlemen, that whenever a plea of insanity is filed it shall be the duty of the court to cause the issue on the plea to be first tried by a special jury, and if found to be true the court shall order the defendant to be delivered to the Superintendent of the Milledgeville State Hospital, there to remain until discharged in the manner prescribed by law . . ."

"I further charge you that under Georgia law every person is presumed to be of sound mind and discretion, but the presumption may be rebutted."

Instructions requested by appellant which were denied by the trial court included several requests based on the dissenting opinions in *Grace v. State*, 231 Ga. 113, 200 S.E.2d 248.

Read in context, we find no harmful error in the trial judge's instructions in the trial of the special plea of insanity. Code Ann. §§ 26-606, 38-105, 106 and 107. *Grace v. State*, supra, concerned the issue of insanity at the time of commission of an alleged criminal offense—not the competence of an accused to stand trial.

[15] Furthermore, even if the views contained in the dissenting opinions in *Grace* were held applicable to the trial of a special plea of insanity, the alleged error would be harmless under the evidence in this case. The evidence was overwhelming that appellant was competent to stand trial. See *Brown v. State*, supra.

We note that on the trial of the general issue (guilt or innocence) the trial judge included in his instructions to the jury a full, clear and comprehensive charge on insanity which embraced the dissenting opinions in *Grace v. State*, supra.[1] Thus, appellant received the benefit of instructions on the insanity issue beyond the requirements of the majority decisions of this court.

[16] Whether the jury viewed the instruction under Code § 27-1502 that "if [the plea of insanity is] found to be true, the court shall order the defendant to be delivered to the superintendent of the Milledgeville State Hospital, there to remain until discharged in the manner prescribed by law." as a caveat that appellant would go free or as an assurance that he would not go free is open to argument. However, in view of the stage of the proceeding when this instruction was given, it was less harmful than the instruction in *Hulsey v. State*, 233 Ga. 261, 262, 210 S.E.2d 797, 799, where the trial judge charged the jury the provisions of Code Ann. §§ 27-1503, 88-506.7 prescribing the actions to be taken by the trial judge if a jury returns a verdict of not guilty by reason of insanity. There, this court held: "Though we have said it is inappropriate to charge the latter part of Code Ann. § 27-1503, relating to the consequences of such a verdict by the jury, does the charging of the latter portion of the statute amount to harmful error requiring a reversal? We conclude that charging the latter part of Code Ann. §§ 27-1503 and 88-506.7 in such a case, though inappropriate, does not amount to harmful error requiring a reversal of the judgment."

As we said in *Hulsey*, of Code Ann. § 27-1503, the better practice is not to charge Code § 27-1502. However, we conclude there was no reversible error in the instruction given here in the context of the entire charge.

6. In enumerations 15 and 16, appellant contends that the verdict of the jury and the judgment of the court finding the appellant competent to stand trial were decidedly against the weight and strength of the evidence and were contrary to the evidence and law of the case. We disagree.

[17, 18] The determination of a preponderance of the evidence is for the jury. This court will not set aside a verdict (or judgment) finding against a special plea of insanity at the time of trial unless it appears that the evidence demands a finding in favor of the plea. *Griffin v. State*, 195 Ga. 368, 24 S.E.2d 399; *Polk v. State*, 19 Ga.App. 332(3), 91 S.E. 439.

[19] The appellant testified that he had been hit in the head with a baseball bat and knocked unconscious when he was 10 or 11 years old, that he began drinking alcohol heavily while he was overseas in Korea and loses consciousness and blacks out when he is drinking, that he has memory lapses and has heard voices talking to him.

However, appellant's testimony was intelligent and was responsive to questions on both direct and cross examination. He was oriented as to time and place, remembered events and dates before and after the offenses, his personal history and people with whom he had contact.

The defense attorney testified concerning difficulties he had communicating with the appellant. The thrust of this testimony was that the appellant persisted in claiming that the rape victim was a willing participant.

1. The pertinent excerpt of the trial court's instructions on insanity at the trial on the general issue is as follows:

"I further charge you that no person shall be convicted of a crime in the State of Georgia unless each element of the crime is proved beyond a reasonable doubt.

"I further charge you that intention is an essential element of any crime, and that the burden is on the State to prove such intention beyond a reasonable doubt.

"I further charge you that while the burden is not on the defendant to disprove intention, nonetheless when he introduces some competent evidence of insanity which might tend to negate evil intention in the defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime, and, therefore, had the requisite criminal intent.

"I further charge you that under Georgia law a person will not be presumed to act with criminal intention, but the triors of fact, the jurors, may find such intention or the absence thereof upon consideration of the words, conduct, demeanor, motives, evidence of sanity or insanity, and all other circumstances connected with the act for which the accused is prosecuted.

"I further charge you that this presumption of sanity may be relied on by the State, and in most cases the State need not bear the burden of introducing evidence and of persuasion as to the sanity of the accused in criminal proceedings; but once the affirmative defense of insanity is raised by the defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State, in order to prove the criminal intent of the accused, must present evidence to prove the sanity of the accused beyond a reasonable doubt.

"I charge you that the question of whether or not the defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the defendant introduce evidence of his insanity sufficient to convince you beyond all reasonable doubt, but, rather, it is only necessary for him to introduce some competent evidence of his insanity. When he has done this, the burden shifts to the State to prove his sanity beyond a reasonable doubt."

Dr. Clarence M. Johnson, Psychiatrist, Mental Health Center of Waycross, Georgia, testified that he examined the appellant but that his examination was not definitive. In his opinion, the appellant apparently suffered from emotional and psychological problems he characterized as a "lack of emotionality" and a history of combativeness and an inability to get along with others. The doctor testified that, "From the history I obtained from his early behavior that have been sort of anti social, or against society, his juvenile record, failure to learn from his behavior, from experience, I would say that his ability to feel guilt associated with acts as to whether they are right or wrong, his decisive opinion . . . of what's right or wrong probably is impaired." Subsequently, Dr. Johnson testified that he could not express an opinion at that time as to whether appellant knew right from wrong.

Dr. Johnson also stated: "In view of his inappropriate affect or feeling tones along with explosive or impulsive behavior that is sometimes combative and his emotional detachment from stressful events that have happened in the past, it appears we are dealing with the underlying psychiatric disorder." Dr. Johnson concluded his testimony by stating that he had not reached any medical opinion in the case as he was "unable to determine a diagnosis."

The Warden of the Ware Correctional Institution, where the appellant was confined prior to his escape, characterized the appellant as normal as any other inmate. The prison medical technician expressed the same opinion.

Under these circumstances, we hold that the evidence was more than ample to support a finding against the special plea of insanity and to determine that appellant was competent to stand trial. *Lingo v. State*, 224 Ga. 333(4), 162 S.E.2d 1.

7. Appellant alleges (enumeration 17) that the court erred in overruling appellant's objection to the district attorney's qualifying the jury as to the death sentence.

In *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356, and *Owens v. State*, 233 Ga. 869, 214 S.E.2d 173, (decided February 12, 1975), this court established that where veniremen are excused because of opposition to the death penalty it was necessary to include a transcription of the voir dire examination to allow this court to determine if the veniremen excused were unalterably opposed to the death penalty as required by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776.

At trial, appellant's counsel objected to the district attorney repeating his questions during qualification of the jury concerning capital punishment.

In his brief, appellant avers: "When the district attorney qualified the jury as to the death sentence all jurors who stated that they could not, under any circumstances, consider imposition of the death penalty were excused."

The State's brief contains the following assertion: "In addition it can be seen from the record that the only objection raised by the appellant with regard to voir dire concerned the "repetitiousness" of the district attorney's questions respecting conscientious objection to the death penalty. Otherwise, no jurors were struck because of such conscientious objection."

[20] The *Owens* case is clearly limited to situations where veniremen are excused because of opposition to the death penalty and the death penalty is subsequently imposed.

In the present case a judgment of the trial judge on motion to correct the transcript pursuant to Ga.Code Ann. § 6-805(f) reflects: "no prospective juror was excused on the basis of being conscientiously opposed to capital punishment . . . the district attorney did ask the question as to whether anyone on the panel had any opposition to capital punishment, but he did not receive an affirmative answer from a single juror, and therefore the court did not excuse or disqualify a prospective juror on the grounds they were opposed to capital punishment."

[21] No prospective jurors having been excused on the ground of opposition to capital punishment, we conclude this enumeration is without merit.

8. In enumerations 19, 23, 24, 28, 29, 34, 37 and 39 appellant contends the court erred in overruling his objection to testimony of certain witnesses on the grounds that such testimony was hearsay.

We have examined the testimony in each of these enumerations and find that the testimony was not hearsay or falls within one of the exceptions to the hearsay rule. These enumerations are without merit.

9. In enumerations 20, 22, 26, 27, 30, 31, 32, 33, 42, 43, and 44, appellant attacks the admissibility of certain specified evidence and testimony of some witnesses.

[22] Four of the enumerations relate to testimony concerning, and the admissibility of, an iron bar utilized by the leader of the escape which was participated in by appellant. The evidence in the transcript indicates this was a concerted escape effort. As an instrument of the crime the bar was admissible and the testimony objected to concerning its use and retrieval was also admissible.

[23] Other testimony and evidence objected to concerned the physical condition of the rape victim, identification of evidence found on appellant, chain of custody and relevancy. Although some of the objections may have gone to the weight of the evidence which is in the province of the jury, this testimony and evidence were material and relevant to the issues before the court.

10. In enumerations 25, 36 and 38 appellant alleges the trial court erred in permitting the State's witnesses on direct examination to testify in response to leading questions over the objections of the appellant.

[24] The Georgia statutory (Code § 38-1706) and case law, e. g., *Ford v. State*, 232 Ga. 511(10), 207 S.E.2d 494, recognize that this is within the sound discretion of the trial court.

[25, 26] There are three isolated instances in this trial to which exception was taken. The trial judge directed the prosecutor to recast his question in the first instance and allowed the second question of whether a witness recognized a drawing as being a correct representation generally of a house where some of the offenses occurred. In the third instance, after directing the prosecutor not to lead the witness, the trial judge permitted the witness to answer "if he could recall anything else he put on the radio other than what he's told the jury already."

Under the circumstances, we find no abuse of discretion on the part of the trial judge. These enumerations are not meritorious.

11. In enumeration 40, appellant complains that the trial court erred in unduly restricting defense counsel's cross-examination of the witness W. E. Strickland, Sheriff of Ware County, Georgia. The transcript reveals that this line of questioning by appellant's counsel was argumentative.

"THE COURT (Interposing) Just a minute. What are we doing here now? You're arguing about what one witness said and what another witness said. Let's go on. If you want to question this witness, question this witness.

"MR. BENNETT: I was under the impression that we were entitled to a thorough and sifting cross examination.

"THE COURT: What I'm stopping you from doing is comparing what this witness said with what another witness said, and you're getting into an argument of whether this witness said this or that witness said that. If there is anything you want to ask this witness you may ask him that's pertaining to this case. Let's proceed."

[27] The right of cross-examination, thorough and sifting, of every party as to witnesses called against him is guaranteed by statute. Code § 38-1705. But this guarantee does not include the right to be argumentative with a witness called by the other side. *Locke v. State*, 229 Ga. 110(4), 189 S.E.2d 410; *Post v. State*, 201 Ga. 81, 39 S.E.2d 1; *Porier v. Spivey*, 97 Ga.App. 209(3), 102 S.E.2d 706; *Loomis v. State*, 78 Ga.App. 153, 168(9), 51 S.E.2d 13.

[28] The trial court did not abuse its discretion in limiting defense counsel's argumentative line of questioning of the witness.

[29] 12. In enumerations 45 and 46, appellant alleges the trial court erred in overruling appellant's motions for mistrial or in failing to properly instruct the jury when, during the State's closing argument, the district attorney argued:

". . . and I will tell you something else that is reasonable to assume—when those officers got there in that situation if he had put a knife to her at that time we wouldn't be having a trial today. That's exactly why he didn't." And,

". . . any contact with this fellow could mean instant death." In each instance the trial court overruled the motion but specifically cautioned the district attorney to "stay away from that."

In the charge, the trial court instructed the jury that: ". . . [the] evidence . . . does not include the opening statements and the closing arguments of counsel."

If the remarks of counsel exceeded the bounds of fair comment on inferences to be drawn from the evidence, the timely corrective action of the trial judge in admonishing counsel to "stay away from that" and his charge to the jury that statements of counsel were not evidence effectively removed any prejudicial effect of the remarks. Code § 81-1009; See, *McCluskey v. American Oil Co.*, 225 Ga. 63, 65, 165 S.E.2d 830; *Howard v. State*, 229 Ga. 839, 840, 195 S.E.2d 14; *Brand v. Wofford*, 230 Ga. 750(9), 199 S.E.2d 231.

The record does not reflect a manifest abuse of discretion in overruling the motion for mistrial and does not require reversal by this court.

13. The sufficiency of the evidence is attacked by appellant in enumerations 47, 48, 49 and 79.

[30] We have carefully reviewed the evidence and find that there is evidence in the transcript from which the jury could find each element of the offenses of escape, armed robbery, rape, kidnapping and motor vehicle theft. The testimony of the victims was clear and uncontradicted. *Strong v. State*, 232 Ga. 294, 206 S.E.2d 461; *Kendricks v. State*, 231 Ga. 670, 203 S.E.2d 859; *Geter v. State*, 231 Ga. 615, 618, 203 S.E.2d 195. The uncontradicted evidence shows appellant escaped from Ware County Prison, broke into the Carver house, robbed the husband, raped the wife and abducted her in the Carver automobile. Thus, the evidence is more than sufficient to sustain the convictions.

14. In enumerations 50 to 65, appellant alleges errors in the presentation of evidence at the pre-sentence hearing of the trial. Specifically, he asserts that the identification of evidence of the appellant's prior convictions was improper, that the admission of testimony pursuant to the appellant's prior convictions was error, that the admission of records of prior convictions with the indictments affixed thereto was error, that certain photographs, though not admitted as evidence, were displayed before the jury in an inflammatory manner, that he was not given notice of the appearance of one of the witnesses who served to identify the records of appellant's prior convictions and irrelevant testimony was elicited from this witness as well as another witness.

[31] Certified copies of appellant's prior convictions of rape, kidnapping, murder and aggravated assault were admitted in evidence. Clerks of the Superior Courts in which the convictions were rendered certified to the authenticity of these documents in accord with Code § 38-601; *Musgrove v. State*, 230 Ga. 46, 195 S.E.2d 407; *McIntyre v. Balkcom*, 229 Ga. 81, 189 S.E.2d 445; *Spurlin v. State*, 228 Ga. 763, 766, 187 S.E.2d 856.

[32-34] Although not required to do so, Warden Bruce Brown, of the Ware Correctional Institute, connected appellant with the sentences. During his questioning of Warden Brown, appellant's counsel challenged the records on the ground that the names on two of the records of prior convictions were spelled differently than that of the appellant. Thereafter, Gary Hull, investigator for the district attorney, Augusta Judicial Circuit, testified that he investigated the crimes reported by the two records of conviction and that the appellant was the person represented by those two records. Appellant objected that he had not been advised Gary Hull would be called. The district attorney stated in his place that at the time this original trial started he did not have the name of this individual. Indeed, the necessity for this witness did not arise until appellant's counsel challenged the records during Warden Brown's testimony. Although Warden Brown's testimony at first may have seemed superfluous, once the convictions were attacked for misnomer, the testimony of Gary Hull was admissible as was the testimony of J. E. Murhee, Deputy Sheriff, Ware County concerning an admission by appellant that he already had a sentence of life imprisonment. The indictments in each case likewise became relevant for connection with appellant.

[35] Gary Hull in his testimony referred to the condition of the victim of one of the prior convictions when he found her. In addition to ruling that testimony out when given, the trial court instructed the jury in the clearest terms as follows: "I instruct the jury that they are not to consider any than just testimony of identification." The transcript does not show that the photographs of the victim in the prior convictions were ever shown to the jury in this case. We find no error.

The testimony of Warden Brown and Investigator Hull identifying the accused as the same person referred to in the records of prior convictions was admissible under Code Ann. § 27-2503. *Davis v. State*, 229 Ga. 509, 192 S.E.2d 253 (concerning Ga.Code Ann. § 27-2534, a prior identical provision).

We find no error in admission of the evidence in aggravation, which materially affected the rights of appellant, and any specified error that occurred was corrected by timely instructions from the trial judge.

15. Appellant's enumerations of error 66 to 76 are directed toward the remarks of the district attorney in his argument on the sentence and the trial court's action on defense counsel's objections thereto.

Enumerations 66 and 67 concern the following reported remarks of the prosecutor, appellant's motions with respect thereto and the action of the trial court thereon.

"MR. PRITCHARD: . . . In Count 2, the charge of rape, the statutory aggravating circumstances as provided by our law would show that he was found guilty of rape; that the offense of rape was committed by a person with a prior record of conviction of a capital felony. It would also add another statutory ground that the offense of rape was committed while the offender was engaged in the commission of another capital felony, to wit: the armed robbery of Allen Carver, as charged in Count 1 of the indictment. So, you see once again the law of Georgia in the safeguards as set out by the Supreme Court requiring certain other statutory grounds of aggravation. The Georgia law has provided other safeguards for the jury. Upon the trial, the judge, your Honor, has the right, after the jury recommends death, to grant the defendant a new trial if he sees fit; and an automatic appeal is provided, and the entire

only was the evidence of guilt established, but also that the evidence warrants the death sentence—

"MR. BENNETT: (Interposing) Now, if it please the court, we feel that the argument of possibility of appeal and the possibility of remission of the sentence—

"THE COURT: (Interposing) That has nothing to do with this argument, and I instruct the jury to disregard any such argument.

"MR. BENNETT: Your Honor, we move for a mistrial at this time. I believe that taints the jury with the suggestion that—

"THE COURT: (Interposing) This is a sentencing phase of the trial now, and anything that the State is arguing has nothing to do with your decision, and I'm not telling you to—I'm directing that you disregard any such argument. It has nothing to do with it. You are now here to impose a sentence that this jury sees fit to do under the evidence and under the law, and you will pay absolutely no attention to anything else other than those two criteria I have just told you. Now, proceed.

"MR. BENNETT: May we have a ruling on our motion?

"THE COURT: Overruled.

"MR. PRITCHARD: May it please the court, I state this for the sole purpose of showing the safeguards—

"MR. BENNETT: (Interposing) We renew our motion for mistrial.

"THE COURT: Overruled. This has nothing to do with this case, and the jury again is instructed that you are to determine the sentence in this case and the punishment as it is from the evidence of the first trial and the evidence that has now been introduced to you, and that is the only thing you are to consider. Now, let's do not go into any of that again."

In *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365, decided February 25, 1975, and *Jordan v. State*, 233 Ga. 929, 214 S.E.2d 365, decided February 25, 1975, this court held that argument from the State at the sentencing phase of the trial involving the death penalty, to the effect of the defendant's right to appeal and automatic review of whether or not the evidence merited the death sentence, or the trial judge's discretion in setting aside the death penalty, is prejudicial and reversible error. In those cases no objection was made at the trial and no cautionary instructions were given by the trial court.

[36] In the present case, we believe the timely cautionary instruction of the trial court was adequate to remove the prosecutor's remarks from consideration by the jury and eliminated any effect the remarks may have had "to attach diminished consequence to their verdict, and to take less than full responsibility for their awesome task of determining life or death for the person before them."

The other remarks of the State that were objected to consisted of a reference to the death penalty as a deterrent for crime, statements to the jury that, "The State of Georgia and you as citizens have the right to put someone to death. That's what you've got to decide," comments on the prior convictions of the appellant, comments on the testimony of Gary Hull which the trial judge again instructed the jury to ignore.

[37, 38] A prosecutor may argue for a death sentence and offer plausible reasons for his position, (*Allen v. State*, 187 Ga. 178, 182, 200 S.E. 109; *Strickland v. State*, 209 Ga. 675(2), 75 S.E.2d 6) and the district attorney may urge severe punishment. *Brooks v. State*, 153 Ga. 413(4), 112 S.E. 453; *Hamilton v. State*, 131 Ga.App. 69, 70, 205 S.E.2d 34. See also *Chenault v. State*, 234 Ga. 216, 215 S.E.2d 223, decided April 9, 1975. These enumerations are not meritorious.

[39] 16. Appellant complains in enumeration 77 that the court furnished to the jury the aggravating circumstances which they are allowed to consider and also a form for their verdict. This issue was decided adversely to appellant in *McCorquodale v. State*, 233 Ga. 369(12), 211 S.E.2d 577.

17. We can find nothing in the record or transcript to support appellant's enumeration 78 that the court considered that portion of the pre-sentence investigation which is not a part of the aggravating circumstances considered by the jury. This enumeration is without merit.

III

Appeal in Case No. 30006

Appellant contends a posttrial hearing on a motion to correct the trial transcript pursuant to Code Ann. § 6-805(f) was infected with three substantial errors.

[40] 1. The first enumeration of error involves the validity, objected to at the hearing, of conducting this proceeding in Coffee County, Georgia, when venue of the criminal case was in Ware County. The motion to correct the transcript is in the nature of court administration, rather than a trial in the usual sense. When it is held within the same judicial circuit by the same trial judge, no problem of venue of trial arises. Venue concerns the trial of cases, not hearings on motions to correct transcripts of cases previously tried. Code § 27-1101.

[41] 2. The second enumeration of error complains that the appellant was not present at this proceeding to correct the transcript and had not waived his presence prior thereto. Due to the nature of the proceeding the appellant's presence was not required at this administrative hearing with counsel.

3. The merits of enumeration 3 are considered in Division 7, *supra*, and found to be without merit.

IV

Sentence Review

[42] The death sentence was imposed after a trial on the merits by a jury. We have reviewed the sentence in accord with Ga.L.1973, p. 159, et seq. (Code Ann. § 27-2537(c)(1-3), as we did in all of the previous death sentences imposed under this statute (see *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612; *House v. State*, 232 Ga. 140, 205 S.E.2d 217; and, *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12, et seq.), and conclude that the sentence of death imposed on the defendant, Ehrlich Anthony Coker, was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence supports the jury's finding of statutory aggravating circumstances (Ga. Code Ann. § 27-2534.1(b)(1) and (2)) viz., that the offense of rape was committed by a person with a prior record of conviction for a capital felony and the offense of rape was committed while the offender was engaged in the commission of another capital felony, to wit, the armed robbery of Allen Carver, as charged in Count I of the indictment.

We have compared the sentence in this case, considering both the crime and the defendant, with other similar cases and conclude the sentence of death is not excessive or disproportionate to the penalty imposed in those cases. Those similar cases we considered in reviewing the case are listed in the appendix.

Judgment affirmed.

All the Justices concur except GUNTER, J., who dissents.

APPENDIX

Similar Cases Considered by the Court: *Walker v. State*, 226 Ga. 292, 174 S.E.2d 440; *Miller v. State*, 224 Ga. 627, 163 S.E.2d 730; *Massey v. State*, 229 Ga. 846, 195 S.E.2d 28; *McCrary v. State*, 229 Ga. 733, 194 S.E.2d 480; *Grantling v. State*, 229 Ga. 746, 194 S.E.2d 405; *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612; *Akins v. State*, 231 Ga. 411, 202 S.E.2d 62; *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12; *Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668.

Supreme Court of the United States

No. 75-5444

Ehrlich Anthony Coker,

Petitioner,

v.

Georgia

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

October 4, 1976

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-5444

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SUPREME COURT, U.S.

EHRLICH ANTHONY COKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

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REASONS FOR NOT GRANTING THE WRIT

I. The imposition and carrying out of the sentence of death in this case would not be violative of the Eighth Amendment prohibition of cruel and unusual punishment. 5

II. The issue of whether the appellate review mechanism of Ga. Laws 1973, pp. 159-172 (Ga. Code Ann. §27-2537) deprived the Petitioner of due process and equal protection under the law, as well as the effective assistance of counsel, has not been seasonably presented to the Supreme Court of Georgia. 12

III. The Petitioner was afforded, in the State trial court, a full and adequate hearing on the issue of his competence to stand trial in accordance with federal and constitutional due process standards. . . . . .

IV. The mere form of the record of the voir dire, which form indicated that no jurors were excluded from the panel on the ground of conscientious objection to the death penalty, is a ministerial issue and not of constitutional dimension. 20

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-

EHRLICH ANTHONY COKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT
IN OPPOSITION

STATEMENT OF THE CASE

Indicted for the offenses of armed robbery, rape, kidnapping, motor vehicle theft, and escape by a grand jury of Ware County, Georgia, Petitioner, Ehrlich Anthony Coker was tried before a jury and found guilty of each charge. Petitioner was sentenced to death on the charge of rape, life imprisonment on the charge of armed robbery, twenty years imprisonment for the offense of kidnapping, seven years imprisonment for the offense of motor vehicle theft, and five years imprisonment for the offense of escape.

On the evening of September 2, 1974, around 7:30 P.M. several inmates of the Ware County Correctional Institution attended a meeting of the Alcoholics Anonymous. Thirty or forty minutes after the meeting began, an inmate wielding a 5 or 6 pound steel bar engineered an escape on the part of three other inmates. The escaping inmates bored through a plywood ceiling, apparently with the above-mentioned steel bar, ran across the roof of the building to another building, and jumped off the latter building in an area not enclosed by the prison fence into the woods adjoining the prison grounds. One of the escaping inmates was the Petitioner, Ehrlich Anthony Coker.

On the same night of September 2, 1974, sixteen year-old Allen David Carver saw the Petitioner come through his back door, at Carver's home. At the time, young Carver was in the kitchen with his wife while his three week-old son was in the bedroom asleep. As the Petitioner entered Carver's house he swung a board over his head, ordered that, "nobody try anything," and commanded that the Carvers, (Allen and his wife, Elnita) go into the Carvers' bedroom. Young Allen Carver had immediately

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noticed that the Petitioner was in prison garb.

The Petitioner, Ehrlich Coker, then proceeded to have Elnita Carver tie her husband's hands and feet together with one of her blouses, and then Coker tied Carver to the shower rod in the bathroom. Coker changed into a pair of Carver's pants and inquired whether the couple had any cigarettes, a gun, anything to drink. Mrs. Carver gave Coker some iced tea, and, while in the kitchen, Coker turned out the lights and put a steak knife with a four-inch long blade under his belt.

Coker also took Carver's billfold, which contained $20.30, and the keys to the family car. The Petitioner then pushed the baby, who was asleep in his basinette throughout the incident, into the bathroom with the baby's father.

The Petitioner then ordered Elnita Carver, who was wearing a nightgown, to get dressed so that she could show the Petitioner how to start the family car. She asked whether she could go to the bathroom to change clothes, which request Petitioner Coker refused. Coker then gagged Allen Carver, still tied up in the bathroom, and raped Elnita despite having been told that Mrs. Carver was physically weak, from having recently left the hospital.

After the rape was completed, the Petitioner inquired and was told how to crank the Carvers' car. The Petitioner then left the house in the victim's car, holding Mrs. Carver at knife point and threatening to kill her if the police followed.

After Coker drove away with Mrs. Carver sitting beside him, Allen Carver managed to untie himself and call the police. A wide-spread search for the Petitoner and Mrs. Carver was immediately undertaken, and, a few miles outside of Waresboro, Georgia, an unmarked police car passed the Carver's automobile at a high rate of speed. Coker suspected that it was a police car and that a road block had been set up ahead. He turned off onto a dirt road, but the road came to a dead end, and Coker responded by backing the car around, stopping, and informing Mrs. Carver that they would wait on the road until the road block was lifted.

About ten minutes later, policemen found the Carver car with Petitioner and Mrs. Carver in it, and Ehrlich Anthony Coker was apprehended and arrested. From the resulting judgment of conviction and sentence of death, Petitioner Coker appealed to the Supreme Court of Georgia. The judgment of conviction and sentence of death were affirmed. Coker v. State, 234 Ga. 555, __ S.E. 2d __ (1975).

Additional facts will be developed subsequently, as necessary, for a more thorough illumination of any issue raised by Petitioner.

REASONS FOR NOT GRANTING THE WRIT

THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH IN THIS CASE WOULD NOT BE VIOLATIVE OF THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT. (Question 1).

A. "Arbitrary Selectivity"

The thrust of Petitioner's argument "is that the arbitrary selectivity condemned in Furman v. Georgia, [408 U.S. 238 (1972)] has been carefully preserved in Georgia's modified capital procedures." Petition p. 27b. Inviting the Court to review this case, involving a statutory response to Furman permitting a modicum of discretionary sentencing, and in inviting the Court to review the"mandatory" (Petition, p. 28b) response to Furman evidenced by Dillard v. North Carolina, No. 73-6875, Petitioner has revealed his true argument; Petitioner would condemn both responses in that, in his view, both perpetuate the "arbitrary selectivity" condemned in Furman. The effect of the Petitioner's argument is to equate discretion in the execution of a capital statute, with the procedures which permit use of the death penalty in an arbitrary, rare, and discriminatory manner, contrary to the teaching of Furman v. Georgia, supra.

The Petitioner's argument erroneously assumes that Furman condemned discretion under the Eighth Amendment per se. In view of the fact that the justices of this Court comprising the majority in Furman expressly or implicitly relied on the "evolving standards of decency which mark the progress of a maturing society" [Trop v. Dulles, 356 U.S. 86, 101 (1958)], it would be anomalous if the capital punishment procedures permissible in the wake of Furman are procedures which must be void of any element of discretion. Indeed, in a prior opinion of the Court a majority, including Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stewart, recognized that without the "link between contemporary community values and the penal system", provided by jury discretion, "the determination of punishment could hardly reflect those same 'evolving standards of decency.'" Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968).

Respondent submits that, if the majority in Furman can be viewed as having agreed upon any single factor in rendering the sentences before them unconstitutional, then that factor was not discretion, but the discrimination presumed to have tainted the exercise of that discretion.

It should also be observed that there is absolutely nothing in the record sub judice to indicate that the discretion permitted by Georgia Laws 1973, pp. 159-172 has been discriminatorily exercised. The historical approach followed by some of the majority in Furman in reliance upon empirical evidence outside the record is precluded

sub judice, for the procedures sub judice are a break with the past. To invalidate the statute under review, the Court would have to hold that the discretion permissible under the statute is so broad as to infect it with an impermissible potential for arbitrary action, a potential so likely to become realized as to justify the Court in quelling it even in the absence of proof of discrimination. While statutes have often been voided under similar circumstances in First Amendment cases [exemplified by Lovell v. City of Griffin, 303 U.S. 444 (1938); cf., Mills v. Alabama, 384 U.S. 214 (1966)], where freedoms vital to our self government were at stake, there is no precedent for taking such a course in a case arising under the Eighth Amendment.

Precluding a jury from exercising a contrclled discretion as provided for in the statute under review would foster the creation of a draconian system with no capacity for mercy. The Court, however, has only recently reaffirmed a rejection of the notion that "every offense in a like legal catagory calls for an identical punishment without regard to the past life and habits of a particular offender." Williams v. Illinois, 399 U.S. 235, 243 (1970), quoting Williams v. New York, 337 U.S. 241, 247 (1949). Surely, the Eighth Amendment is broad enough to encompass the exercise of controlled sentencing discretion, for even the dissenters in Furman ". . . could more easily be persuaded that mandatory sentences of death, without the intervening

and amelioratory impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution." Furman v. Georgia, supra, at 402.

As written and construed, Georgia procedures satisfy the criteria delineated above. Under the 1973 statute, once guilt is determined on a capital charge, there are ten statutory aggravating circumstances," one of which, at least, must be present beyond reasonable doubt before death can be imposed." Ga. Laws 1973,pp. 159, 162, 164-166, 170-171, amended, in part, without material change, Ga. Laws 1974, pp. 352, 355-358 [Ga. Code Ann. §§26-3102, 27-2503,(formerly 2534.1), -2534, -2537 (Supp. 1974)]. The statutory aggravating circumstance is a procedural prerequisite to death sentence imposition, its presence beyond reasonable doubt does not mandate a death sentence.

If death is imposed, there is a second level set of guidelines by which the Supreme Court of Georgia reviews the sentence. Ga. Code Ann. §27-2537, supra. Like the statutory aggravating circumstance at the trial level, these standards of review place procedural barriers in the way of imposition of death, not the non-imposition. The precise issue, then, which Petitioner would place before the Court is whether the Eighth Amendment forbids the Georgia statute, whose discretionary guidelines control the imposition of death with clear and objective standards but at no point require a death sentence.

Review for disproportionality has resulted, for all practical purposes, in elimination of the death sentence for armed robbery. Floyd v. State, 233 Ga. 280 __ S.E.2nd __ (1974); Gregg v. State, 233 Ga. 117, __S.E. 2nd __ (1974). Rape and probably kidnapping will require particularly pathetic circumstances. Compare Coley v. State, 231 Ga. 829, 204 S.E. 2nd 12 (1973) with Eberheart v. State, 232 Ga. 247, 206 S.E. 2nd 12 (1974). The classic death sentence will be one for senseless murder. See eg., Gregg, supra; House v. State, 232 Ga. 140, 205 S.E. 2nd 217 (1974).

Respondent respectfully suggests that the holding in Furman may be stated as the following, constitutionally required result under any capital procedure: Isolated defendants cannot be sentenced to die on the basis of chance or arbitrariness or social attitudes. A death statute must be applied under limited, objective circumstances defined by a rational relation between the nature and degree of the crime involved, and, the maximum sentence which can be imposed. A review of the aggravating circumstances contained in the Georgia death statute show that each and every aggravating circumstance delimits the reasoned judgment of jurors to imposition of the death penalty only where a crime falls under the following three simple catagories:

(1) The crime under review is particularly heinous or wanton, vicious and without rational provocation.

(2) The crime under review is committed for a "cold-blooded" and callous purpose by a person obviously lacking in regard for human life.

(3) The crime under review involves the murder of a person whose duty is criminal deterrence.

The Georgia statute also involves two separate but important catagories; These are treason and the commission of a capital felony by a repeat capital felony offender. The imposition of the death penalty for the crime of treason is self-explanatory even under federal law, however, the last catagory is the subject of the following subsection.

B. Excessiveness

Petitioner argues that "the punishment of death is excessive, disproportional, and aberrational for rape and kidnapping." Petition, p. 29b. Petitioner does not distinguish between those rapes that, because of the victim's fear or threat of harm by the attacker, involve no more physical force that an ordinary act of sexual intercourse and those rapes that can only be discribed as heinous, vicious, or atrocious. Compare Coley v. State, supra, with Eberheart v. State, 232 Ga. 247 (1974); McCorquodale v. State, 233 Ga. 369 (1975).

However, in the case sub judice, although the Petitioner committed the crime of rape under two of the statutory aggravating circumstances, the Respondent concedes that there was nothing particularly heinous or vile about the crimes for which the Petitioner was convicted. Nevertheless, this Court cannot possibly overlook the fact that for the Court to legislate that the State cannot impose the death penalty upon an individual who had been previously been convicted for murder, rape and kidnapping in two different situations, in addition to being an escapee from a prison at the exact time of the commission of the crime in the case sub judice [two different aggravating circumstances], would be to trod so heavily upon states' "police powers" as to facilitate the earlier referred to creation of draconian system with no capacity for mercy.

II. THE ISSUE OF WHETHER THE APPELLATE REVIEW MECHANISM OF GA. LAWS 1973, PP. 159-172 (GA. CODE ANN. §27-2537) DEPRIVED THE PETITIONER OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, AS WELL AS THE EFFECTIVE ASSISTANCE OF COUNSEL, HAS NOT BEEN SEASONABLY PRESENTED TO THE SUPREME COURT OF GEORGIA. (Question 2).

As noted previously, Petitioner attacks Ga. Laws 1973, pp. 159-172 on the basis of a perceived unconstitutionality of the statute under Furman v. Georgia, 408 U.S. 238 (1972). In arguing that the statute is plagued with "arbitrary selectivity" Petitioner, in fact, has argued that the appellate review mechanism provided for under the statute does not ameliorate what Petitioner perceives to be an otherwise arbitrary statute subject to condemnation under Furman; indeed, argues Petitioner, the review mechanism results in "a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972." Petition, p. 22b. The second issue raised by Petitioner, however, exceeds the "perpetuation" attack and asserts that the review mechanism fosters constitutional deficiences separate and apart from asserted Eight Amendment prohibitions against capital punishment.

The question of whether the appellate review mechanism separate and apart from any asserted deficiencies under Furman, deprives the indigent capital defendant of due process and equal protection under the law, as well as the effective assistance of counsel, has not been presented to the Supreme Court of Georgia. For purposes of review in this Court, Petitioner's attempt to raise a federal question in this Court is untimely. See Bohannan v. Arizona, 389 U.S. 1 (1967); Herndon v. Georgia, 295 U.S. 441 (1935); Jett Brothers Distilling Company v. Carrollton, 252 U.S. 1 (1920); see also Miller v. California, 413 U.S. 15, 34 n. 14 (1973); Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).

The second question framed by Petitioner is not ripe for consideration by the Court.

III. THE PETITIONER WAS AFFORDED, IN THE STATE TRIAL COURT, A FULL AND ADEQUATE HEARING ON THE ISSUE OF HIS COMPETENCE TO STAND TRIAL IN ACCORDANCE WITH FEDERAL AND CONSTITUTIONAL DUE PROCESS STANDARDS. (Question 3).

The Petitioner contends that "The present case presents an important procedural question left unanswered by 'Pate' and 'Drope': Is a hearing 'adequate' to determine competence when the State introduces no expert testimony and when the court-appointed psychiatrist who has interviewed the defendant is unable to give a medical opinion as to the defendant's competence because further examination is necessary?" An examination of the record in the case sub judice and the constitutional authority cited by the Petitioner will make clear that no such "procedural question" is relevant to this Court's review of this case.

In a word, the facts of the case sub judice, along with presently existing state and federal law governing findings on a defendant's competence to stand trial render unnecessary this Court's delimiting the holding in Drope v. Missouri, __ U.S. __, 43 L. Ed. 2d 103 (1975) and Pate v. Robinson, 383 U.S. 375, 15 L.Ed. 2d 815, 86 S. Ct. 836 (1966).

Prior to the trial of the Petitioner on the charges for which he was convicted and sentenced, the Petitioner entered a special plea of insanity on which a hearing before a jury was held

in order to determine the Petitioner's competence to stand trial. The special plea of insanity is provided by Ga. Code Ann. §§27-1502, 1504 whenever the defense or the State contends that a given accused is incompetent to stand trial. In Georgia, the test of competency to stand trial is simply whether or not the defendant is mentally capable at the time of trial of understanding the proceedings against him, of comprehending the defendant's condition in reference to such proceedings, as well as the defendant's capacity to render his attorney such assistance as a proper defense to a criminal accusation demands. Brown v. State, 215 Ga. 784 (1), 113 S.E. 2d 618 (1960). It is clear that such a test essentially involves a finding of fact.

At the hearing on the Petitioner's special plea, the Petitioner testified. His testimony was intelligent and responsive to questions asked on both direct and cross-examination. The Petitioner remembered dates and events occurring before and after the crime for which he was convicted, facts involving his personal history, people with whom the Petitioner had contact pursuant to his arrest, etc. Undoubtedly, no single factor was as convincing of the Petitioner's capacity to ably assist in his defense than Petitioner's own testimony.

The court-appointed psychiatrist who examined the Petitioner was of the opinion that latent mental disorders were in fact indicated. The psychiatrist discussed generally, deficiencies in the Petitioner's psychological dynamic, but was unable to arrive at a conclusive diagnosis of the Petitioner's mental condition. However, a reading of the transcript of the special plea hearing will show that on direct examination, the psychiatrist was questioned basically in regard to the Petitioner's capacity to distinguish "right from wrong" in the context of the crimes committed by the Appellant.

Notwithstanding the irrelevance of the Petitioner's moral knowledge regarding crimes which he had committed or was capable of committing, the psychiatrist testified that the Petitioner knew who he was, knew who the psychiatrist was, knew who the Petitioner's attorney was, knew why the psychiatrist was examining the Petitioner, and knew the legal consequences of the crimes for which the Petitioner was charged.

In addition, the Warden wherein the Petitioner was housed prior to Petitioner's escape and subsequent criminal venture, as well as the prison paramedic testified that the Petitioner seemed to them as normal as "any other inmate". Upon submission of the evidence to the jury, the jury found the Petitioner competent to stand trial.

Pate v. Robinson, supra, and Drope v. Missouri, supra, are cases which deal with circumstances under which an accused is entitled to a hearing on the issue of competence to stand trial. Both cases involve situations where in one measure or another such a hearing was denied the accused in those cases. Although Pate and Drope do not clearly delineate evidentiary factors in determining competence to stand trial such as the burden of proof, the quantum of expert evidence required, or the weight of a given expert versus lay evidence, both cases acknowledge the need for the exercise of sound discretion and scrupulous examination on the part of the finder of fact.

In Drope v. Missouri, supra, it was held:

"The import of our decision in Pate v. Robinson, is that evidence of defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of

manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrist can entertain on the same facts."

The above-quoted dicta of this Court was aimed at the same considerations bearing on the case sub judice. The Petitioner was afforded a hearing involving the testimony of a psychiatrist, lay witnesses, and the Petitioner himself. The trial judge had the opportunity to observe the demeanor of the Petitioner during the pre-trial hearing.

Notwithstanding the many factors which must be taken into account in any determination of the competence of an accused to stand trial, the Petitioner would have this Court consider legislating a rule to be applied to the State such that when the State introduces no expert testimony and no psychiatrist is able to give a complete medical opinion as to the sanity of the accused, the accused has not had an adequate hearing to determine his competence to stand trial. Not only would such legislation do nothing towards guaranteeing the competence of defendants at their trials, but to so legislate would be an exercise in administrative and factual discretion not of constitutional dimension. Compare 18 U.S. Code Ann. §4244; United States v.

Huff, 409 F. 2d 1225, cert. den. 396 U.S. 857, 90 S. Ct. 123 (1969); Wolcott v. United States, 407 F.2d 1149, cert. den. 90 S. Ct. 156, 396 U.S. 879 (1969); United States v. Muncaster, [D.C. Ala.] 345 F. Supp. 970 affd. 472 F.2d 1407, cert. den. 93 S. Ct. 3021, 412 U.S. 963 (1972).

Essentially, the only distinction in practice between the Georgia procedure for determining competence to stand trial and the Federal procedure is the more liberal Georgia right to a jury trial on the issue. Moreover, as can be seen from the record to the case sub judice, the Petitioner can show no violation of his right to due process of law. Pate v. Robinson, supra; Drope v. Missouri, supra.

IV. THE MERE FORM OF THE RECORD OF THE VOIR DIRE, WHICH FORM INDICATED THAT NO JURORS WHERE EXCLUDED FROM THE PANEL ON THE GROUND OF CONSCIENTIOUS OBJECTION TO THE DEATH PENALTY, IS A MINISTERIAL ISSUE AND NOT OF CONSTITUTIONAL DIMENSION. (Question 4).

Before the trial of the case sub judice, the court reporter omitted to record the voir dire of the jury except as to objections raised by counsel. Counsel for the Petitioner did pose an objection during voir dire to the effect that the District Attorney should not pose any further question regarding conscientious scruples against capital punishment.

Of course, proceedings pursuant to a trial are normally recorded by a court reporter. However, in the case sub judice the clerk of the court compiled a list of the jury panel and of those jurors struck either peremptorily or for cause. The list showed that no jurors were struck for cause of any kind.

Indeed, the Petitioner does not assert that jurors were struck from the panel because of conscientious scruples against the death penalty in contravention of Witherspoon v. Illinois, 391 U.S. 510 (1968). Instead, the Petitioner simply seeks to obtain a reversal of his convictions on a fabricated technical ground couched in terms of the Sixth Amendment confrontation clause.

In essence, then, the fourth question presented for review by this Court merely presents an issue of Georgia appellate practice wherein records on appeal can be supplemented as an administrative function. However, unless such supplements to records are unquestionably reliable, they are not allowed. Owens v. State, 233 Ga. 869 (1975).

In effect, the Petitioner's argument is tantamount to complaining because the Petitioner himself was not present at oral argument before the Supreme Court of Georgia on appeal to that court. Coker v. State, 234 Ga. 555 (1975).

In Draper v. Washington, 372 U.S. 487, 9 L. Ed. 2d 899 83 S. Ct. 744 (1963), the Court reviewed the adequacy of substitute transcripts to be provided for indigent defendants where the State chose to avoid the expense of transcribing a full trial. Although the context of the aforementioned case is different, the technical rule is the same:

> "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial in which the Appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's

> minutes taken during the trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript." Draper v. Washington, supra, [at p. 495].

Little is required to point out that a defendant's Sixth Amendment right to confrontation of accusers could not possibly be violated where, at a hearing, the only individuals to be confronted are judges, clerks, court reporters, attorneys or Supreme Court Justices. Such a hearing has nothing to do with the crimes for which the Petitioner was convicted.

The Respondent submits that the Petitioner's question number 4 presented for review is patently unmeritorious.

CONCLUSION

The Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by the Petitioner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-5444

EHRLICH ANTHONY COKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

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IN THE

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EHRLICH ANTHONY COKER,

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Georgia affirming petitioner's convictions of rape, armed robbery, kidnapping, escape, and motor vehicle theft, and his sentence of death by electrocution for rape, is reported at 234 Ga. 555, 216 S.E.2d 782 (1975) (A. 332-343). The judgment of the Ware County Superior Court finding petitioner guilty and sentencing him to die is unreported and appears at A. 317-318.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3) (1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Georgia was entered on May 20, 1975, rehearing denied June 17, 1975, and July 10, 1975. The petition for certiorari was filed on September 15, 1975, and was granted on October 4, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the Georgia Code Annotated:

Ga. Code Ann. §26-2001 (1972)

"*Rape.*—A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one or more than 20 years. No

conviction shall be had for rape on the unsupported testimony of the female."[1]

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[1] In addition to being convicted of the crime of rape, petitioner was convicted of violating the following statutes:

Ga. Code Ann. §26-1312 (1972)

"*Kidnapping.*—(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

. . . .

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-1813 (1972)

"*Motor vehicle theft.*—(a) *First offense.*—(1) Motor vehicles.—The theft of any motor vehicle as defined by an Act regulating traffic upon the highways, approved January 11, 1954 (Ga. Laws 1953, Nov.-Dec. Sess., p. 566) [Chapters 68-15 through 69-17], shall be a felony. Any person convicted thereof shall, the first offense, be punished by imprisonment in the penitentiary for not less than three years nor more than seven years: Provided that the jury may recommend that same be punished as for a misdemeanor."

Ga. Code Ann. §26-1902 (1972)

"*Armed robbery.*— A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense of robbery by intimidation shall be lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-2501 (1972)

"*Escape.*—A person commits escape when he: (a) having been convicted of a felony or misdemeanor, or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful

(continued)

Ga. Code Ann. §26-3102 (1975) supp.)

"*Capital offenses; jury verdict and sentence.*—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1975 supp.)

"*Recommendation to mercy.*—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of

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(footnote continued from preceding page)

confinement; or (b) being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement. A person who, having been convicted of a felony or misdemeanor, is convicted of escape shall be punished by imprisonment for not less than one nor more than five years. Any other person convicted of escape shall be punished as for a misdemeanor except that a person who commits escape while armed with a dangerous weapon shall, upon conviction, be punished by imprisonment not less than one nor more than 10 years."

imprisonment for life. Such recommendation shall be binding upon the judge."

Ga. Code Ann. §27-2503 (1975 supp.)

"*Presentence hearings in felony cases.*—(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall

resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

Ga. Code Ann. §27-2512 (1972)

"*Electrocution substituted for hanging; place of execution.*—All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death, shall suffer such punishment by electrocution instead of by hanging.

In all cases in which the defendant is sentenced to be electrocuted it shall be the duty of the trial judge, in passing sentence, to direct that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director. However, no executions shall be held at the old prison farm in Baldwin County."

Ga. Code Ann. §27-2513 (1972)

"*Death chamber and apparatus.*—The Board of Corrections shall provide a death chamber and all necessary apparatus, machinery and appliances for inflicting such penalty by electrocution."

Ga. Code Ann. §27-2514 (1975 supp.)

"*Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.*—Upon a verdict or judgment

of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2515 (1972)

"*Execution by warden and assistants; witnesses.*—There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the condemned

person so desires, his counsel, relatives and such clergymen and friends as he may desire."

Ga. Code Ann. §27-2516 (1972)

"*Certificate of execution.*—The executioner and attending physician shall certify the fact of such execution to the clerk of the superior court of the county in which said sentence was pronounced, which certificate shall be filed by the clerk with the papers in the case."

Ga. Code Ann. §27-2517 (1972)

"*Disposition of body; expenses of transporting body.*—The body of the person so executed shall be delivered to the relatives if they so desire, and in case no claim is made by relatives for such body the same shall be disposed of as bodies of convicts dying in the State penitentiary: Provided, that if the nearest relatives of the person so executed desire that the body be carried to the former home of the person so executed, if in the State, the expenses of such transportation shall be paid by the ordinary, or the board of commissioners of roads and revenues, county commissioners or other person or persons having charge of the county funds out of any funds on hand in the treasury of the county in which such person was convicted."

Ga. Code Ann. §27-2534.1 (1975 supp.)

"*Mitigating and aggravating circumstances; death penalty.*—(a) the death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation.

The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537 (1975 supp.)

"*Review of death sentences.*—(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a

synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner Ehrlich Anthony Coker has been condemned for the offense of rape under Georgia's 1973 capital punishment statute.

On September 2, 1974, petitioner was serving sentences for murder, rape, kidnapping, and aggravated

assault at the Ware Correctional Institution three miles west of Waycross, Georgia.[2] (A. 306-312.) At 8:10 p.m., during an Alcoholics Anonymous meeting in the prison chapel attended by petitioner and thirty-two other inmates and supervised by two guards, an inmate named Brinks suddenly brandished a two-foot long wrench and declared, " 'Don't move. This is an escape. I don't want to hurt anybody.' " (A.80.) The guards were allowed to gather together the inmates who were not assisting Brinks; a group of nine prisoners, including petitioner, refused to join the guards. (A. 82.) During the confrontation between Brinks and his confederates and the guards, petitioner and three other inmates tore out the plywood ceiling in a hallway leading to the chapel and climbed into an attic which opened onto the roof of the building. A few minutes later, guards took charge of the inmates in the chapel without any violence and returned them to their respective cells. A head count revealed that petitioner and two other prisoners were not present in their cells. (A. 102.)[3]

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[2] On March 12, 1973, petitioner was convicted in the Richmond County Superior Court of the kidnapping and rape of one Susan Lorrine Jones and received sentences of, respectively, life imprisonment and twenty years imprisonment. (A. 307.) On May 28, 1973, in the Taliaferro County Superior Court, petitioner pleaded guilty to the rape of and aggravated assault upon Miss Jones, and received sentences of, respectively, life imprisonment and eight years imprisonment. (A. 311-312.) On April 6, 1973, in the Clayton County Superior Court, petitioner pleaded guilty to the rape and murder of one Sue Ann Wick and received sentences of, respectively, twenty years imprisonment and life imprisonment. (A. 309.)

[3] There was no evidence that petitioner helped plan the disturbance or held the captured guards hostage. A report prepared by Ware Correctional Institution Warden Bruce Brown, contained in a presentence investigation report which was not before the sentencing jury (*see* note 15 *infra*), recites:

"During the inside Alcoholics Anonymous Meeting held in the Visiting Room on September 2, 1974 at approximately

(continued)

Later that evening, at approximately 11:00 p.m., sixteen-year-old Allen Carver (A. 111) and his wife,

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(footnote continued from preceding page)

8:00 P.M., the following inmates were involved in kidnaping and holding as hostages Officers Joyce Shiver and Gene A. Barber: Dearwood Huggins, Samuel Bennie Butler, James Thomas Dixon, Robert Lawton Jones, William G. Brinks, and James E. Skidmore. Inmates Brinks, Jones, and Skidmore acted as ring leaders. The ring leaders had the use of a knife and a 24-inch handmade wrench weighing approximately 12 pounds and they ordered Officer Shiver not to interfere as they were planning to take over the institution and planning a mass escape.

"Shortly thereafter Officer Barber went to the Visiting Room to obtain a key from Officer Shiver. Officer Barber was jerked inside the Visiting Room and ordered not to interfere if neither officer wanted to get hurt.

"Officer Terrell Sublet, who was in charge of the front gate at this time, was informed of what was going on in the Visiting Room by an inmate. This inmate worked in the Officer's Dining Room and was coming from the shower room when he saw Officer Barber being pulled into the Visiting Room. He immediately came to the front gate and informed Officer Sublet of this happening. Officer Sublet immediately advised the Warden of what was taking place as he was not in his office at this time.

"Warden Bruce Brown then went to the front gate and asked for a spokesman to inform him of what was taking place. Inmate Brinks came to the front gate and stated that he had two officers that they were planning to hold until they were promised a transfer from the institution that same night. Warden Brown told him to release the officer then they would discuss the demands.

"Inmate Brinks went back into the Visiting Room and the two officers were released unharmed. They in turn were ordered to lock up all the inmates and get a count immediately. The count showed three inmates missing. Roll call indicated that Frank Smith, Jr., Ehrlich A. Coker, and Jefferson Holland were the three missing.

"Further investigation disclosed that they had escaped from the fire hatch in the loft of the Visiting Room and torn out the east vent escaping from the room of the building

(continued)

Elnita,[4] who had given birth to a son three weeks earlier (A. 112), were in the kitchen of their Waycross home when petitioner suddenly entered the house through the unlocked kitchen door. Petitioner, twenty-four years old, was five feet, seven inches tall and weighed about 140 pounds. (A. 206, 257.) He was wearing prison clothes and was holding a "board" (A. 114) over his head. He said, " 'Don't anybody try anything and nobody will get hurt' " (A. 141), then ordered the Carvers to go into the bedroom where he had Mrs. Carver tie her husband's hands and feet together with one of her blouses. Unsatisfied with her work, petitioner tied Carver to the shower rod in the bathroom. (A. 115, 168.) He changed into a pair of Carver's pants and inquired whether the couple had any cigarettes, a gun or a knife, anything to drink. (A. 116, 172.) Holding Mrs. Carver's arm, he went with her into the kitchen, where she gave him some iced tea and a steak knife with a four-inch blade. (A. 168-169.) In the kitchen, petitioner turned out the lights and put the knife under his belt loop. (A. 118, 146, 169.) He then returned to the bedroom where he took Carver's

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(footnote continued from preceding page)

near the Officer's Dining Room area. After this they headed toward the ballfield and there freedom.

"Warden Brown talked with Officers Shiver and Barber shortly afterwards. Both officers were in a high state of tension and stated they feared for their lives since Inmate Brinks and others were armed with a knife and a heavy iron wrench.

"Warden Brown stated that warrants would be taken for all these inmates charging them, with the exception of Inmates Coker, Smith, and Holland, with kidnapping and interfering with officers in the line of duty. Inmates Coker, Smith, and Holland were charged with escape."

(A. 259-260.)

[4] Both Carvers were sixteen years old. (A. 111, 326.) They were married on April 7, 1974. (A. 183.)

billfold, which contained $20.30, and the keys to the family car from a dresser top. (A. 125, 171.) He pushed the bassinette containing the baby, who was asleep throughout the incident, into the bathroom with Carver. (A. 139-140, 185-186.) Carver complained that his hands were growing numb in their bonds. (A. 138.) Petitioner replied that "it was better than being dead." (ibid); then he untied Carver from the shower rod, bound his hands to the bathroom sink and his feet to the toilet, and gave him a pillow to rest his head on (A. 138-139). According to Carver, petitioner "said for me not to try anything funny, that he didn't want to have to hurt me, and he said he'd hurt me . . . .[i]f I tried anything." (A. 116.)[5] Through the closed bathroom door, Carver heard his wife say " 'Please don't mess with me,' " and he "hollered" at petitioner, " 'Hey, you said you weren't going to mess with my wife,' " whereupon petitioner returned to the bathroom and gagged Carver (A. 117).

Petitioner ordered Elnita Carver, who was wearing a night gown, to get dressed so that she could show him

[5] On cross-examination, Mr. Carver testified:

"Q [Defense Counsel] Now, I thought I understood you to say that after he had you tied with your hands on the sink and your feet around the commode, is that when he said, 'Don't try anything funny. I don't want to hurt you'?"

A [Mr. Allen Carver] No.

Q When did he say that?

A When he started to messing with my wife and I told him that he said he wasn't going to do it, and he just said, 'Shut your mouth.' He said, 'I don't want to have to hurt you.'

Q He didn't say he was going to hurt you, did he? He said he didn't want to hurt you? Is that right?

A Yes."

(A. 144.) Carver also testified that he did not hear petitioner "threaten her [Mrs. Carver] any way." (A. 150.)

how to start the family car. (A. 172.) She asked whether she could go to the bathroom to change clothes, "and he said no, that he'd saw plenty of naked people before and he told me to go ahead and change the clothes right there." (*Ibid.*) Petitioner had previously dressed in Mr. Carver's clothes; however, as Mrs. Carver testified:

> "[w]hen I pulled off my gown he come up there and he started feeling of me – he come up to the back of me and started feeling of me, and I started crying and I told him to quit, and he kept on saying that he wouldn't hurt me, and that I'd better shut up, and I kept on telling him to quit and not mess with me. I told him not to touch me, or anything, and he gagged Allen so that he couldn't talk. I think it was with a piece of underwear and then tied something around his mouth, and he closed the bathroom door so that Allen couldn't see him, and then he kept on feeling of me and I kept crying and telling him to quit, and Allen started trying to say something, and I couldn't understand what he was saying. He was mumbling something. And I kept on telling him to quit and he said, 'I ain't hurting you, am I.' And I was scared and I didn't know what to say, and I just shook my head no, and I didn't say nothing and he said, 'I want your husband to know that I ain't hurting you.' He said, 'Tell your husband I ain't hurting you.' And I just said, 'Uh, huh,' like that. I didn't say it loud, and he said, 'He can't hear you saying it like that,' and, so, I said, 'No.' And then he said – he said, 'Come on out and tell your husband that I ain't hurting you if I ain't,' and, so I said, 'Allen, he ain't hurting me,' and I kept crying and I kept telling him to quit, and then he asked me – he said, 'When is the last time you've been with your husband?' And I said before I had the baby, and he said 'Well, it's time again, ain't it?' And I didn't say nothing."

(A. 172-173.) Petitioner then disrobed, "held the knife up at" Mrs. Carver (A. 174), placed it on top of the dresser, and "whispered . . . 'You know what's going to happen to you if you try anything, don't you?' And I was scared and I didn't know what to say, so I shook my head yes, and so he put the knife back down." (*Ibid*.) Petitioner proceeded to have sexual intercourse with her:[6] "he was on top of me and he kept on, and directly he got up and he told me to get on top of him, so, I got up and got on him, and he kept on till he got finished, and then he told me to get up and I got up." (*Ibid*.) Petitioner did not "hurt . . . [her] in any other way physically aside from" the act of intercourse (A. 188), although Mrs. Carver also testified that at this time she "still was menstruating from having the baby and I was weak, and everything" (A. 173).

After putting his clothes back on[7] and allowing Mrs. Carver to dress, petitioner inquired whether she knew the way to Atlanta. (A. 175.) Neither she nor her husband could give petitioner directions, and petitioner announced that he was taking Mrs. Carver with him. (A. 175.) According to Mrs. Carver, petitioner declared to her husband:

> " 'I'm going to take your wife with me, and if I don't get stopped by a police car or anything before I get to Waresboro,' he said, 'I'll tie her up and put her out at the station in Waresboro at that corner,' . . . . [H]e pulled the gag off of Allen's mouth when he was talking to him, and Allen said, 'Well, just make sure you don't hurt her,' and he put the gag back on his mouth and he said – he said, 'Well, I'm taking her with me.' He said, 'if you get loose and call the police,' he said, 'any time I see a police car pull up behind me and motion for me to get over or something like that,' he said, 'your wife is going to be dead.' "

(A. 176.)[8]

After petitioner drove away with Mrs. Carver sitting beside him, Allen Carver freed himself, went to a neighbor's house, and had the police called (A. 121-123) at about 1:15 a.m. (A. 154). Carver told the neighbor that "a convict" had raped and abducted his wife. (A. 153.) A widespread search for petitioner and Mrs. Carver was undertaken.

When petitioner and Mrs. Carver passed through Waresboro, he indicated that he would not let her out there but would keep her with him until the car ran out of gas. (A. 177.) A few miles outside of Waresboro, an unmarked police car passed the Carver automobile at a high rate of speed,[9] and petitioner suspected that it was a police car and that a roadblock had been set up ahead. (A. 178.) He turned off onto a dirt road, but the road soon came to a dead end, and he backed the car

[6] A vaginal examination of Mrs. Carver, performed at 5:00 a.m., September 3, 1974, disclosed the presence of sperm. (A. 196.)

[7] When petitioner was arrested, he was wearing Carver's shirt and pants and was carrying Carver's billfold (A. 126-128, 133-134). Petitioner's prison shirt and pants, marked with his prison laundry number, were found in the Carver bedroom by the police after petitioner's apprehension. (A. 163, 164, 219.)

[8] According to Allen Carver, petitioner gestured at Mrs. Carver with the knife during this speech. (A. 121.) According to Mrs. Carver, however, the knife was in petitioner's back pocket at this time. (A. 176.) Allen Carver also testified that, as he was leaving, petitioner "said that if he would get pulled over or the police was following him in any way that he would kill – he would kill my wife. He said he didn't have nothing to lose – that he was in prison for the rest of his life, anyway." (A. 121.)

[9] The Sheriff of Ware County, who was driving this unmarked patrol car, later testified that he had suddenly come up behind the Carver car at a curve in the road and had elected to pass the car without attempting to stop it or signal to it in order to prevent harm to Mrs. Carver. (A. 207.)

around and stopped, informing Mrs. Carver that they would wait there until the road block was lifted. (*Ibid.*) Petitioner unbuttoned her blouse but closed it again when she complained of the mosquitoes. (A. 178-179.) He also described his plan to get another car for his trip to Atlanta. (A. 179.)[10]

About ten minutes later, a police car turned down the dirt road and stopped in front of the Carver car. According to Mrs. Carver:

> "he said, 'I think that's a policeman right now,' and I didn't say nothing. He said – he said, 'Well, I reckon they're going to get me now,' and, he said, 'I won't never get away.' And I kept on setting there, and right after that one come up and parked some more cars started coming up and they all parked and all I could see was the lights shining, and then all those men got out and they started coming up there and they told him to get out of the car, and he set there for a minute and then he got up and got out of the car and they took him to the back and searched him and handcuffed him."

(A. 179-180.) Petitioner did not attempt to harm Mrs. Carver with the knife, which was behind the car's sun visor, although he had "ample opportunity" to do so according to the testimony of the Sheriff who led the arrest party. (A. 211-212.) Mrs. Carver appeared to the Sheriff to be "scared," "highly nervous," and "in a

[10]Petitioner told Mrs. Carver that the two of them would return to Waycross where he would send her to the door of a house "that just has a lady in it." (A. 177.) When the "lady" came to the door, petitioner would " 'jump up there and scare her with this knife.' " (*Ibid.*) The two of them would then " 'go in there and tie her up and get all her money.' " (*Ibid.*)

partial state of shock," but she didn't appear to be hurt in any way." (A. 213.)[11]

Petitioner was subsequently charged with escape, rape, armed robbery, motor vehicle theft, and kidnapping. (A. 4-5.) The indictment for rape charged that petitioner "unlawfully and with force and arms, did have Carnal Knowledge of Elnita Carver, a female, forcibly and against her will." (A. 4.) Counsel was appointed to represent him, and he entered both a special plea of insanity (A. 9) (that is, under Georgia practice, a plea of present incompetence to be tried) and a general plea of insanity (*ibid.*) (that is, a plea of not guilty by reason of insanity at the time of the offense) to the charges against him. A trial was first held upon petitioner's special plea of insanity to determine his competence to stand trial on the five criminal charges; and on November 19, 1974, the jury found him competent. (A. 75.)[12]

[11]The post-trial report of the trial court indicated that Mrs. Carver had not been "physically harmed or tortured." (A. 325.)

[12]The sanity trial was conducted pursuant to Ga. Code Ann. §27-1502 (1972). At this hearing, petitioner testified that he had received a blow to the head with a baseball bat when he was ten or eleven years old and that, as a result, he had blackout spells and memory lapses and frequently heard mysterious voices. (A. 13-15.) He also testified that it was his habit to drink alcohol heavily and frequently and that he customarily passed out as a result of a drinking bout. (A. 13-14.) Petitioner's defense counsel testified that petitioner was unable to assist effectively in his defense since he was unable to relate key facts, frequently altered his story of what happened, and seemed utterly unconcerned about the possible capital consequences of some of the charges he faced. (A. 25-29.) Dr. Clarence M. Johnson, a psychiatrist appointed pursuant to petitioner's motion, had interviewed petitioner for fifty minutes and examined his past psychiatric record. (A. 10, 35.) The doctor recommended further psychological testing and an electroencephalograph (e.e.g.) monitoring as the basis for a definite diagnosis (A. 36, 38, 40), but these tests were never performed (A. 49-50). In Dr.

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Petitioner's trial began the next day. At the close of the evidence,[13] the trial court instructed the jury on the elements of the crime of rape:

(footnote continued from preceding page)
Johnson's opinion, petitioner exhibited symptoms of temporal lobe seizure disorder due to the childhood blow on the head which, when aggravated by alcohol, might account for petitioner's aggressive behavior, and which might also prevent him from fully cooperating with defense counsel. (A. 38-39.) In his report, Dr. Johnson concluded that " 'it appears we are dealing with an underlying psychiatric disorder.' " (A. 40.) He emphasized, however, that in the absence of further examination and analysis, he could not even express an opinion as to whether petitioner "knows right from wrong" (A. 51) and would be capable of cooperating in his defense. The State presented the testimony of the Sheriff, two deputy sheriffs, and the warden and a medical technician at the Ware Correctional Institution, all of whom had observed petitioner in custody. (A. 51-68.) These witnesses stated that petitioner appeared to them to be mentally competent and capable of understanding the proceedings against him. (A. 54, 61, 65, 68.) The trial court instructed the jury that it was petitioner's burden to satisfy them by a preponderance of the evidence that he was presently incapable of understanding the nature and object of the proceedings against him (A. 70-73):

> "Now, members of the jury, I charge you that the question raised by the defendant's special plea of insanity in this trial is not whether the defendant can distinguish between right and wrong, but whether or not he is capable at this time and at the time of his trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings and is capable of rendering his attorney such assistance as a proper defense to this indictment preferred against him demands."

(A. 73.) The jury returned a verdict stating, "We the Jury find the defendant, Ehrlich Anthony Coker, competent." (A. 75.)

[13]Petitioner presented one witness, Dr. Clarence M. Johnson, who again testified that his interview and evaluation of petitioner were "inconclusive" and that "further testing was indicated." (A. 229.) He stated that he simply could not determine whether petitioner "was able to judge between right and wrong," and could not rule out the possibility of brain damage (A. 233, 234) on the basis of his examination. He added that the temporal lobe seizure disorder that he suspected petitioner was subject to could be "objectively or physically demonstrated or precluded" by electroencephalographic or intoxointerviewing techniques. (A. 234.)

> "Now, I charge you that a person commits rape when he has carnal knowledge of a female forcibly and against her will.
>
> Carnal knowledge and rape occurs when there is any penetration of the female sex organ by the male sex organ.
>
> No conviction shall be had for rape on the unsupported testimony of the female.
>
> Testimony of the female must be corroborated by other competent evidence."

(A. 251.) The court also instructed the jury on petitioner's general plea of insanity.[14] The jury found petitioner guilty as charged on all five counts. (A. 254.)

[14]The trial judge instructed the jury that a defendant was presumed sane but that upon the introduction of "some competent evidence of insanity" (A. 247) the State was obligated to prove sanity beyond a reasonable doubt. The jury was obligated to find petitioner not guilty by reason of insanity if it found either that he was unable to distinguish between right and wrong or that he was subject to a "delusional compulsion" at the time of the crime:

> "Now, ladies and gentlemen of the jury, I charge you that the test of criminal responsibility in this State is that if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. And there has been but one recognized exception – delusional compulsion. Our law provides a person shall not be found guilty of a crime when at the time of the act, omission or negligence constituting the crime, such person, because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.
>
> "Now, in this State no cognizance is taken of what has been termed impulsive or emotional insanity, where a criminal act is done under some overwhelming and irresistible impulse, unless it be that such impulse is the result of a mental disease or mental defect overriding reason and judgment and obliterating the sense of right and wrong so as to fall within the generally accepted right and

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A hearing was convened the following day to determine sentence on the potentially capital rape and armed robbery charges. The State introduced evidence of petitioner's prior murder conviction, three rape convictions, one kidnapping conviction, and two aggravated assault convictions, *see* note 2 *supra.*[15]

(footnote continued from preceding page)

wrong test, or the exception above referred to of delusional compulsion. Nor under our law is any recognition taken of so-called moral insanity, or of an irresponsibility from a lack of ability to control the will from the habit of indulgence; nor [sic] mental abnormality, mere weak mindedness, unless amounting to imbecility or idiocy, which, like lunacy or insanity, may be held to deprive the offender of the sense of right and wrong. Now, the defendant being impressed with delusions of [sic] hallucinations is not enough. His criminal act must stem from such mental disease, injury or congenital deficiency, or else his accountability for the criminal act is measured by the general test of whether he could at the time of the crime's commission distinguish right from wrong."

(A. 248-249.)

[15]A former investigator for the Richmond County Sheriff's Office testified that he had been the first to discover and minister to Susan Lorrine Jones (two of petitioner's prior rape convictions, the kidnapping conviction, and the aggravated assault conviction stemmed from assaults on this victim during a continuing incident in which she was transported across a county line):

"At this time when I found her and photographed her she was in very severe condition, very, very, bad condition. She had been found on the edge of a road. I also have photographs of where I investigated that scene where her body was left completely beaten and left apparently for dead, with no clothes on, and carried back into these woods approximately fifty feet."

(A. 280.) This testimony was probably meant to be withdrawn from the jury's consideration as improperly admitted. It was originally introduced over petitioner's repeated objection (A. 279); subsequent objections on the same ground eventually produced a ruling by the court that the testimony of the former investigator was to be limited to identification of petitioner as

(continued)

On the rape count, the trial court charged the jury that it "may consider" (A. 298) as statutory aggravating

(footnote continued from preceding page)

the person who had previously been convicted under specified indictments (A. 284); and the jury was so instructed. Nevertheless, petitioner's motions for a mistrial were overruled (A. 285, 292), and this damaging, inadmissible evidence was permitted to remain in the record without even a clear and specific instruction to the jury to disregard it. (*See* A. 278-290.)

A presentence investigation report which was never introduced at all before petitioner's sentencing jury contains the following description:

"State's Version:

According to information received, the defendant did on July 29, 1972 have sexual intercourse with the complainant, Susan Lorraine [sic] Jones, forcibly and against her will, within the premises of the Hudson Oil Company located at 1831 Gordon Highway, Augusta, Georgia.

"Upon further investigation, it was discovered that the defendant and co-defendant, Glenn Harlan Stacy, removed the complainant from a telephone booth against her will and forced her to go with him to the Hudson Oil Company at which time she was forcibly raped. Afterwards the defendant, Coker, put co-defendant, Stacy, out alongside the road and took the complainant to Wilkes County, Georgia where she was further beaten and molested. She was found later in a wooded area very badly beaten and at the point of death.

"Upon reviewing photographs that were taken in reference to this case, the complainant, Susan Lorraine [sic] Jones, was put through a living Hell. She had bruises and black eyes with a distorted face which made her look like some kind of freak. Having been drug through brush and along the ground in her state of nakedness, the skin was literally scraped from her body and she was a raw mass of flesh, along her breast and chest cavity and shoulders.

"Co-defendant, Glenn Harlan Stacy, was also indicted along with the defendant, Anthony Coker, but as of this date disposition in his case is still pending."

(A. 261.) We have included these two matters in our brief in anticipation of the respondent's reliance on them although they are not properly part of the record of evidence that may be considered in reviewing the death sentence imposed upon petitioner by the jury's sentencing verdict.

circumstances justifying imposition of the death penalty[16] (1) whether the offense of rape was committed by a person with a prior record of conviction for a capital felony, and (2) whether the offense was committed while the offender was committing another capital felony (armed robbery).[17] (A. 299.) The trial court instructed that "of course, you are under no circumstances required to impose the death sentence, regardless of any aggravating circumstances" (*ibid.*), because the jury could find that "mitigating circumstances" predominated:

> "mitigating circumstances are those that do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability of punishment [sic]."

(A. 300.) The court also charged that the State must prove aggravating circumstances beyond a reasonable doubt. (A. 298.) The jury's verdict on the rape count was "Death by Electrocution", and it found both of

[16]On the armed robbery count, the trial court instructed the jury that it "may consider" as a statutory aggravating circumstance justifying imposition of the death penalty for armed robbery, whether the offense was committed by a person with a prior record of conviction for a capital felony. (A. 298.) The jury's punishment verdict on the armed robbery count was "Recommend Mercy for the Defendant." (A. 314.)

[17]"Now, as to Count 2, wherein the defendant has been found guilty of Rape you may consider one or more of the following statutory aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed under Count 2: 1. The offense of Rape was committed by a person with a prior record of conviction for capital felony. 2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment." (A. 298-299.)

the aggravating circumstances which the trial court had submitted to it. (A. 315.)[18]

On December 4, 1974, the trial court entered a death sentence on the rape count and a sentence of life imprisonment on the armed robbery count. It consecutively sentenced petitioner to twenty years imprisonment on the kidnapping count, seven years imprisonment on the motor vehicle theft count, and five years imprisonment on the escape count. (A. 316-321.)

On May 20, 1975, the Supreme Court of Georgia affirmed petitioner's convictions and sentences, with Mr. Justice Gunter dissenting. (A. 332-343.)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On November 11, 1974, petitioner filed a pretrial Motion to Quash the indictment on the ground that the statutory authorization of the death penalty for rape "is unconstitutional in that it constitutes cruel and unusual punishment per se and as applied to defendant

[18]The punishment verdict form given to the jury for this count contained three alternatives: "1. Death by Electrocution 2. Recommend Mercy For the Defendant 3. Recommend That The Judge Impose Sentence." (A. 315.) The jury drew a line through the second and third alternatives. (*Ibid.*) The form also stated "If death is recommended and fixed as punishment, complete the following: We further find the following aggravating circumstances:", (*ibid.*), and the jury had written in the ensuing blank space: "1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver as charged in Count I of the indictment." (*Ibid.*)

herein, in violation of the Eight [sic] and Fourteenth Amendments to the Constitution of the United States." (A. 7.) This motion was denied on November 18, 1974 (A. 8), and petitioner assigned the ruling as error in his Enumeration of Error No. 2: "[t]he [trial] Court erred in overruling the appellant's written motion to quash the indictment."

A majority of the Georgia Supreme Court rejected this claim:

> "In his motion, appellant made a general attack on the constitutionality of the Georgia Death Penalty Statute, Ga. L. 1973, pp. 159, 163 (Code Ann. §27-2534.1). This statute has been repeatedly upheld by a majority of this court. See *Coley v. State*, 231 Ga. 829, 933, 204 S.E.2d 612; *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d *Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668; *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (decided April 9, 1975). We affirm those rulings here."

Coker v. State, 234 Ga. 555, 216 S.E.2d 782, 788 (1975) (A. 334).

SUMMARY OF ARGUMENT

The Eighth Amendment forbids punishments which are grossly excessive and disproportioned to the offense. While the rape of an adult woman is a serious crime, it almost nowhere except in Georgia viewed today as warranting the punishment of death. That the use of the death penalty for the crime of rape has been overwhelmingly repudiated by evolving standards of decency is indicated (A.) by the minute number of statutes imposing the death penalty for rape which were enacted after this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), (B.) by the minuscule

number of persons now under sentence of death for this crime, and (C.) by the accelerating historical trend towards abandonment of death as a punishment for rape in the United States and throughout the world. By a unanimous concurrence of the relevant objective indicators of contemporary societal values, capital punishment for rape is excessive. It therefore violates the Eighth Amendment.

ARGUMENT

I.

INTRODUCTION

In its decisions upholding some forms of capital punishment on July 2, 1976, the Court undertook to "consider whether the punishment of death is disproportionate to the crime for which it is imposed." *Gregg v. Georgia*, 428 U.S. ___, 49 L.Ed.2d 859, 882 (1976) (plurality opinion).[19] It answered that question in the negative in those cases, after noting carefully that "we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender," *ibid.*[20]

[19]The term "plurality opinion" will hereinafter designate the opinions of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, announcing the judgment of the Court in the five capital punishment cases decided on July 2, 1976 (*Gregg v. Georgia*, 428 U.S. ___,49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. ___, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. ___, 49 L.Ed.2d 927 (1976); *Woodson v. North Carolina*, 428 U.S. ___, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. ___, 49 L.Ed.2d 974 (1976)). The opinions of Mr. Justice White in the respective cases, joined by the Chief Justice and by Mr. Justice Rehnquist, will be designated hereinafter as "opinion of Mr. Justice White."

[20](Footnote omitted.) The opinion of Mr. Justice White also carefully confined itself to a decision "whether the death penalty imposed for murder" is constitutional, *Gregg v. Georgia, supra* 49 L.Ed.2d at 893 (opinion of Mr. Justice White); *see also id.* at 901.

The question was explicitly reserved "whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life – for example, when capital punishment has been imposed for rape . . . that does not result in the death of any human being." *Id.* at 882 n.35 (plurality opinion).

That question is presented in this case. Petitioner Ehrlich Anthony Coker stands condemned for an offense of rape[21] in which the victim was neither killed nor subjected to serious physical injury. *See* pages 18-22 *supra.* We submit that the death penalty for such a crime is an unconstitutionally cruel and unusual punishment.

II.

DISPROPORTIONALITY AS A MEASURE OF CRUEL AND UNUSUAL PUNISHMENT

It was no accident that the Court felt obliged *sua sponte* to inquire into the question of proportionality before sustaining the death penalty for murder in the

[21]Throughout this brief, "rape" will refer to that crime when it is not attended by the death of the victim. When the victim dies, the crime is invariably punishable as felony-murder; and in many jurisdictions, the fact that death occurred during the course of a rape may be an "aggravating circumstance" which may be grounds for imposition of the death penalty, *see, e.g.*, Ga. Code Ann. §27-2534.1(b)(1) (1975 supp.); Fla. Stat. Ann. §921.141(5)(d) (1975-76 supp.). Under Georgia law, however, a death sentence may not be imposed for both rape and rape-murder if these crimes are perpetrated on the same victim, *see Gibson v. State,* ___ Ga. ___, 226 S.E.2d 63 (1976) (vacating death sentence for rape because that crime was predicate of felony-murder conviction; affirming death sentence for felony-murder).

Gregg, Proffitt and *Jurek* cases. Such an inquiry is basic to "those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[22] Restraints upon disproportionate punishment[23] run deep in the Anglo-American tradition;[24] and

[22]*Weems v. United States,* 217 U.S. 349, 366-367 (1910).

[23]Justice Field's dissenting opinion in *O'Neil v. Vermont,* 144 U.S. 323, 339-340 (1892), speaks of the "inhibition against all punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged." O'Neil, a New York liquor dealer, had been convicted of 307 separate offenses of the illegal sale of liquor in Vermont and had been given a cumulative sentence of fifty-four years imprisonment. Justices Harlan and Brewer agreed with Justice Field that O'Neil's sentence was excessive "in view of the character of the offences committed." *Id.* at 366, 371. The majority of the Court declined to reach the merits of the question because it was not properly presented and because the Eighth Amendment was not then viewed as a restraint upon the States. *Id.* at 331-332. ***But see Robinson v. California,*** 370 U.S. 660 (1962).

[24]Magna Carta contains three chapters requiring that amercements (discretionary fines) be proportioned to the measure of magnitude of offenses. MAGNA CARTA, Ch. 20-22 (1215), printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 42, 45 (1926). Granucci sets forth at length the English history of the restriction on disproportionate punishments, Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CAL. L. REV. 839, 844-847 (1969). The Cruel and Unusual Punishments Clause of the English Bill of Rights of 1689, from which the similar provision of the Eighth Amendment was taken verbatim, was in large part "a reiteration of the English policy against disproportionate penalties." *Id.* at 860.

The concept has, of course, survived to this day in England. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 80 (1968):

> "There are many different ways in which we think it morally incumbent on us to *qualify* or *limit* the pursuit of

(continued)

their expression in the Eighth Amendment[25] was a principal ground of decision in the oft-cited case of *Weems v. United States*, 217 U.S. 349 (1910).[26]

Weems, a United States Coast Guard disbursing officer for the Port of Manila, was sentenced to fifteen

(footnote continued from preceding page)

the utilitarian goal by the methods of punishment. Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility; we also limit punishments in order to maintain a scale for different offences which reflects, albeit very roughly, the distinction felt between the moral gravity of these offences. Thus we make some approximation to the ideal of justice of treating morally like cases alike and morally different ones differently." (Emphasis in original.)

[25]In addition to their English heritage, *see* note 24 *supra*, the Framers were influenced by the writings of such Enlightenment philosophers as Beccaria, Montesquieu, Voltaire, and Locke, who provided a natural law rationale for the principle of proportionality of punishment. *See* Schwartz & Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 782, 806-815 (1975). "Beccaria ['s] essay *On Crimes and Punishments* helped shape our Fifth and Eighth Amendments." BRANT, THE BILL OF RIGHTS 464 (1951). *See also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 21 (1962); *Ullman v. United States*, 350 U.S. 422, 450 (1956) (dissenting opinion of Mr. Justice Douglas). *See generally*, Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145 (1967).

[26]The opinion of the Court in *Weems* was announced by Justice McKenna and was joined by Justice Harlan, Justice Day and Justice Moody. Justice White announced a dissenting opinion, in which Justice Holmes joined.

years of the *cadena temporal*[27] for falsely entering outlays in his cashbook. *Id.* at 357-358. This Court struck down the punishment as cruel and unusual.[28] While the sentence imposed on Weems was harsh and outlandish in nature, its condemnation by the Court rested expressly upon its excessiveness for the crime of falsifying public records,[29] and its consequent lack of "adaptation of punishment to the degree of crime." *Id.*

[27]The *cadena temporal*, which derived from the Penal Code of Spain, 217 U.S. at 363, was a combination of punishments including a large fine, imprisonment at hard labor for a specified period (in *Weems*, fifteen years), with " 'no assistance whatsoever from without the institution,' " 217 U.S. at 464, " 'always carry[ing] a chain at the ankle, hanging from the wrists,' " *ibid.*, civil interdiction, permanent forfeiture of civil and political rights, and subjection to official surveillance for life, *ibid.*

[28]The Court noted that the sentence "excite[s] wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime . . . [T]he law in controversy seems to be independent of degrees." 217 U.S. at 365. Justice McKenna explicitly adopted Justice Field's dissenting opinion in *O'Neil v. Vermont*, *supra*, that the "inhibition [of the Eighth Amendment] was directed not only against punishments which inflict torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offense charged.' " 217 U.S. at 371.

[29]"It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source." 217 U.S. at 377.

at 365.[30] In *Gregg v. Georgia, supra,* 49 L.Ed.2d at 873 (plurality opinion), *Weems* was accordingly construed as rejecting "the proposition that the Eighth Amendment reaches only punishments that are 'inhuman and barbarous, torture and the like.' . . . Rather [*Weems*] . . . focused on the lack of proportion between the crime and the offense." That focus was a necessary corollary of the constitutional requirement that "[a] penalty must . . . accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' *Trop v. Dulles,* [356 U.S. 86, 100 (1958)] . . . (plurality opinion). This means, at least, that the punishment not be 'excessive.' . . . [And] the inquiry into excessiveness [implies not only that] . . . the punishment must not involve the unnecessary and wanton infliction of pain [but also that] . . . the punishment must not be grossly out of

[30]*See also Downey v. Perini,* 518 F.2d 1288 (CA6) *vacated and remanded for reconsideration in light of new Ohio statute,* 423 U.S. 993 (1975); *Hart v. Coiner,* 483 F.2d 136 (CA4 1973); *Ralph v. Warden,* 438 F.2d 786 (CA4 1970); *Roberts v. Collins,* 404 F. Supp. 119 (D. Md. 1975); *Adams v. Carlson,* 368 F. Supp. 863 (E.D. Ill. 1973). State courts, too, have recognized the principle that excessiveness will bring a penalty within the ban of constitutional prohibitions of cruel and unusual punishment. *See, e.g., People v. Schueren,* 10 Cal.3d 533, 11 Cal. Rptr. 129, 516 P.2d 833 (1973); *In re Lynch,* 8 Cal.3d 410, 105 Cal. Rptr. 217, 503 P.2d 921 (1972); *State v. Evans,* 73 Idaho 50, 245 P.2d 788 (1952); *Dembowski v. State,* 251 Ind. 250, 240 N.E.2d 815 (1968); *Workman v. Commonwealth,* 429 S.W.2d 374 (Ky. 1968); *Garvey v. Whitaker,* 48 La. Ann. 527, 19 So. 457 (1896); *McDonald v. Commonwealth,* 183 Mass. 322 (1899); *People v. Lorentzen,* 387 Mich. 167, 194 N.W.2d 817 (1972); *Territory v. Ketchum,* 10 N. Mex. 718, 65 P. 169 (1901) (dictum); *Cannon v. Gladden,* 203 Ore. 629, 281 P.2d 233 (1955); *State v. Kimbrough,* 212 S.C. 348, 46 S.E.2d 273 (1948); *Calhoun v. State,* 85 Tex. Crim. 496, 214 S.W. 335 (1919).

proportion to the severity of the crime." 49 L.Ed.2d at 874 (plurality opinion).

To state that the Eighth Amendment outlaws punishments which are grossly disproportionate to offenses is, however, only the beginning of the relevant inquiry here. For the crime of rape – like other crimes involving violence or the risk of violent injury, such as aggravated assault, attempted murder, arson, burglary, robbery, and kidnapping – is a serious and dangerous offense, intuitively distinguishable from the making of false entries in an official account book. While rape has historically been perceived as less reprehensible than murder, *see* pages 46-48 *infra,* it is indisputably a grave crime, deserving stringent punishment. And the constitutional concept of adaptation does not require that the punishment fit the crime with mathematical precision. Neither legislatures nor courts, nor the sciences of penology, are equipped for that kind of exact measurement.[31]

On the other hand, what is at issue in this case is the "unique and irreversible penalty of death," *Woodson v. North Carolina,* 428 U.S. ___, 49 L.Ed.2d 944, 951 (1976) (plurality opinion) (footnote omitted). It "cannot fairly be denied . . . that death is a punishment different from all other sanctions in kind rather than degree [or that] . . . the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment" for a particular crime, *id.* at 961 (footnote omitted).

[31]*See* Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1078-1080 (1964).

The question whether a crime may be punished with death as opposed to imprisonment is therefore qualitatively different, under the Eighth Amendment, than the question whether a crime may be punished with a greater rather than a lesser term of imprisonment.[32] For just as the Cruel and Unusual Punishments Clause restricts a State's power to impose the extreme penalty arbitrarily, *Furman v. Georgia*, 408 U.S. 238 (1972), and without due consideration of the aggravating and mitigating characteristics of the particular offender and offense, *Woodson v. North Carolina, supra*; *Roberts v. Louisiana*, 428 U.S. ___, 49 L.Ed.2d 974 (1976), so also does it forbid a State blindly and arbitrarily to ignore gradations in the gravity of crimes when it authorizes the infliction of the extreme penalty of death.

III.

THE DISPROPORTIONALITY OF DEATH AS A PUNISHMENT FOR RAPE

We submit that Georgia has plainly violated that Eighth Amendment principle here. Alone among American States today – and virtually alone among the jurisdictions of the civilized world – Georgia has seen fit to authorize the imposition of the death penalty for the crime of rape of an adult woman. Even in Georgia the extreme penalty for that crime is actually meted out in only an insignificant handful of arbitrarily selected cases. If petitioner is put to death for rape, he will die in the face of an extraordinary national and international consensus repudiating death as the punishment for his crime.

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[32]The question presented here is thus distinguishable from that presented in *Badders v. United States*, 240 U.S. 391 (1916).

This Court has said that the assessment of the constitutionality of a particular punishment under the Eighth Amendment "does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia, supra*, 49 L.Ed.2d at 874 (plurality opinion). The relevant "indicia of societal values . . . include history and traditional usage, legislative enactments, and jury determinations." *Woodson v. North Carolina, supra*, 49 L.Ed.2d at 951-952 (plurality opinion) (footnotes omitted). In the subsections that follow, we consider first the latter "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," *id.* at 954: "legislative enactments" and "jury determinations," *ibid.* We then advert to the lessons of history and tradition which give these indicators meaning in a broader context.

A. Legislative Enactments

If "[t]he most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman* [enactment by thirty-five States of laws authorizing the death penalty for various forms of homicide]," *Gregg v. Georgia, supra*, 49 L.Ed.2d at 878 (plurality opinion), then the most striking proof of contemporary society's repudiation of the death penalty for rape is the minuscule number of states that have adopted legislation authorizing the death penalty for any form of rape in the wake of *Furman*. In 1926, twenty American jurisdictions (eighteen States, the federal government, and the District of Columbia) provided the death penalty as a

possible punishment for the rape of an adult female.[33] By 1971, this number had decreased to seventeen.[34] In all seventeen jurisdictions, the death penalty for rape was imposed at the unfettered discretion of the jury or the trial court; hence *Furman v. Georgia*, 408 U.S. 238 (1972), invalidated each of these statutes. Following *Furman*, only Georgia, North Carolina, and Louisiana enacted statutes authorizing the death penalty for the rape of an adult female.[35] In the latter two States, only limited categories of rapes were made capital.[36]

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[33]Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. 234, 241-242 (1926).

[34]Ala. Code, tit. 14, §395 (1958 recomp. vol.); Ark. Stat. Ann. §41-4303 (1964); Fla. Stat. Ann. §794.01 (1965); Ga. Code Ann. §26-2001 (1970 rev. vol.); Ky. Rev. Stat. Ann. §§435.080-435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950); Md. Code Ann. § 27-461 (1957); Miss. Code Ann. § 2358 (1956 recomp. vol.); Vernon's Mo. Stat. Ann. § 559.260 1953); Nev. Rev. Stat. § 200.363 (1967) (rape with substantial bodily harm); N.C. Gen. Stat. § 14-21 (1953); Okla. Stat. Ann., tit. 21, §1115 (1958); S.C. Code Ann. §§ 16-72, 16-80 (1962); Tenn. Code Ann. § 39-3702 (1955); Vernon's Tex. Penal Code Ann. § 1189 (1961); Va. Code Ann. § 18.144 (1960 repl. vol.); 18 U.S.C.A. § 2031 (1970).Original Meaning, 57 CAL. L. REV. 839, 844 (1969).

[35]Ga. Code Ann. §27-2534.1 (1975 supp.); N.C. Gen. Stat. §14-21 (1975 cum. supp.); La. Rev. Stat. §14:42 (1974).

[36]Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), the death penalty was authorized generally for rape in North Carolina and was imposed at the discretion of the sentencing jury:

> "Every person who is convicted at ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

N.C. Gen. Stat. §14-21 (repl. vol. 1969). The decision of the Supreme Court of North Carolina in *State v. Waddell*, 282 N.C.

(continued)

Florida, Mississippi, and Tennessee, it should be noted, also enacted post-*Furman* statutes authorizing

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431, 194 S.E.2d 19 (1973), made the death penalty mandatory for all rape offenses defined by §14-21. In 1974, however, the North Carolina legislature enacted N.C. Sess. Laws 1973, c. 1201, §2 (1974 sess.), which provided a new §14-21, splitting the old rape offense into a new capital "First-Degree Rape" and a new non-capital "Second-Degree Rape":

> "Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape –
>
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape – Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

In Louisiana, the crime of rape is defined by La. Rev. Stat. §14:41 (1974):

> "Rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime."

However, the death penalty is authorized only for "Aggravated Rape":

> "Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of

(continued)

the death penalty for certain rapes of children by

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the female because it is committed under any one or more of the following circumstances:

(1) Where the female resists the act to the utmost, but her resistance is overcome by force.

(2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by death."

La. Rev. Stat. §14:42 (1974). The penalty for "Simple Rape" is one to twenty years imprisonment:

"Simple rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

(1) Where she is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic or anesthetic agent, administered by or with the privity of the offender; or when she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity.

(2) Where she submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

(3) Where she is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of her incapacity.

Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years."

La. Rev. Stat. §14:43 (1974). (In 1975, La. Acts 1975, No. 612, was enacted which slightly revised the definition in §14:41 as "Rape; heterosexual," added a new §14:41.1 defining "Rape; homosexual," and revised §14:42 to provide the death penalty for aggravated homosexual rape.)

adults.[37] But the North Carolina and Louisiana statutes were effectively invalidated by *Woodson v. North Carolina* and *Roberts v. Louisiana*;[38] and, when the Louisiana legislature enacted a new death penalty law applying to first degree murder on August 1-2, 1976,[39]

[37]Fla. Stat. Ann. §794.011(2) (1975-1976 supp.) (death penalty authorized for person eighteen years of age or older who commits a "sexual battery" upon a "person" eleven years of age or younger); Miss. Code Ann. §97-3-65 (1974) (death penalty authorized for person eighteen years of age or older who rapes a female twelve years of age or younger); Tenn. Code Ann. §39-3702 (1974) (death penalty authorized for person eighteen years of age or older who rapes a female twelve years of age or younger).

[38]*See, e.g., Dull v. North Carolina,* 428 U.S. ____, 49 L.Ed.2d 1211 (1976), *vacating State v. Dull,* 289 N.C. 55, 220 S.E.2d 344 (1975); *Selman v. Louisiana,* 428 U.S. ____, 49 L.Ed.2d 1212 (1976), *vacating Selman v. State,* 300 So.2d 467 (La. 1974); *Watts v. Louisiana,* 428 U.S. ____, 49 L.Ed.2d 1212-1213 (1976), *vacating Watts v. State,* 320 So.2d 146 (La. 1976).

[39]On August 1 and 2, 1976, the Louisiana legislature amended that state's first degree murder statute, La. Rev. Stat. Ann. §14:30 (1974), which provided a mandatory death penalty for first degree murder. *See Roberts v. Louisiana, supra.* It enacted La. Act 1976, No. 316 (S.B. 196) (Aug. 1, 1976), effective Oct. 2, 1976, which repealed the mandatory death penalty for first degree murder and provided alternative penalties of death or life imprisonment for this crime. It also enacted La. Acts 1976, No. 694 (H.B. 1507) (Aug. 2, 1976), effective Oct. 2, 1976, which provided new procedures for selecting the penalty of death or life imprisonment in first degree murder cases. The Legislature did not, however, enact similar provisions to modify Louisiana's aggravated rape statute, La. Rev. Stat. Ann. §14:42 (1974), *see* note 36 *supra,* leaving the State without any post-*Gregg* death penalty for rape.

it did not reenact the death penalty for the crime of aggravated rape.[40]

Thus, like the *cadena temporal*, Georgia's death penalty for rape now "has no fellow in American legislation," *Weems v. United States, supra*, 217 U.S. at 377. The observation made half-a-dozen years ago, of

[40]Although two persons have been condemned for "sexual battery" under Fla. Stat. Ann. §794.011(2) (1975-1976 supp.), *see* note 41 *infra*, their appeals have not yet been heard by the Supreme Court of Florida. This Court has upheld the constitutionality of a death sentence for first degree murder imposed under Florida's capital procedures. *Proffitt v. Florida*, 428 U.S. ____, 49 L.Ed.2d 913 (1976).

Tennessee's capital rape statute provides a mandatory death penalty: "Whoever is convicted of the rape of any female under twelve years of age shall suffer death by electrocution." Tenn. Code Ann. §39-3702 (1975 repl. vol.). No defendant is now on Death Row for this crime. Constitutional challenges to Tennessee's mandatory death penalty for first degree murder are now pending in the Supreme Court of Tennessee, *see, e.g., Collins v. State*, Tenn. Sup. Ct. No. 63 (Hamblen County).

On October 5, 1976, the Supreme Court of Mississippi ruled that the State's mandatory death penalty for capital murder was unconstitutional in the light of *Woodson v. North Carolina, supra*, and *Roberts v. Louisiana, supra*. *Jackson v. State*, 337 So.2d 1242 (Miss. 1976). It remanded the case for a new trial under judicial guidelines for the imposition of the death penalty and ruled that "justice demands that the persons convicted and sentenced to death prior to our holding today should have the benefit of all the guidelines outlined herein." 337 So.2d at 1257. Mississippi's post-*Furman* capital rape statute provided a mandatory death penalty for rapes perpetrated against female children: "Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a female child under the age of twelve (12) years, upon conviction, shall be sentenced to death." At the time of the Mississippi Supreme Court's *Jackson* decision, one white defendant had been condemned for rape. *State of Mississippi v. Terrence Upshaw*, Hinds County (Miss.) Cir. Ct. No. 0-421 (death sentence imposed May 18, 1976).

"a legislative trend to abolish capital punishment for this crime," *Ralph v. Warden*, 438 F.2d 786, 793 (CA4 1970), has proved prophetic. And if the reenactment of thirty-five statutes punishing murder with death after *Furman* indicates the public's acceptance of capital punishment for murderers, then, by an ineluctable logic, the legislative response to *Furman* indicates that "a large proportion of American society [does not] continu[e] to regard . . . [capital punishment] as an appropriate and necessary criminal sanction" for rape. *Gregg v. Georgia, supra*, 49 L.Ed.2d at 878 (plurality opinion).

B. Jury Determinations

There are almost as few persons condemned for rape in the United States today as there are statutes which make rape a "capital" offense. So far as we can tell, petitioner is one of five persons in the entire country now under sentence of death for rape; and two of these were condemned under a statute limited to the rape of children.[41] While a somewhat larger number of defendants was condemned for rape under the now-defunct mandatory death penalty statutes enacted in

[41]John Wallace Eberheart (*Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974) (rape), pending on petition for certiorari as *Eberheart v. Georgia*, No. 74-5174); John Wesley Hooks (*Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668 (1974) (rape), pending on petition for certiorari as *Hooks v. Georgia*, No. 74-5954); Clarence R. Purdy (*State of Florida v. Clarence R. Purdy*, Lake County (Fla.) Cir. Ct. No. 74-561 (Feb. 12, 1975) (sexual battery of a child), pending on appeal to Florida Supreme Court as No. 47,074); Benjamin F. Huckaby (*State of Florida v. Benjamin F. Huckaby*, Volusia County (Fla.) Cir. Ct. No. 74-833-B (June 26, 1975) (sexual battery of a child), pending on appeal to Florida Supreme Court as No. 47,736).

North Carolina and Louisiana following *Furman*, that number was still not large. Specifically, fourteen persons were condemned for rape in Louisiana, and eight in North Carolina, during the period between *Furman* and *Gregg*.[42] Numbers in these dimensions under supposedly *mandatory* capital-punishment statutes obviously do not manifest public acceptance of the death penalty for rape, but rather its extreme opposite. And the fact that only three defendants are now under sentence of death for rape in Georgia – despite the circumstance that Ga. Code Ann. §27-2534.1 has been in effect for more than three years and authorizes the death penalty for a wide range of rape offenses – is a strikingly clear indication that death as a punishment for rape has been publicly repudiated even in that State.

We have been able to find forty-two cases in which the Supreme Court of Georgia has reviewed rape convictions since enactment of the State's 1973 death-penalty statute.[43] In only four of these was a death sentence imposed.[44] Moreover, it must be remembered that, while all death-sentence cases are automatically reviewed by the Georgia Supreme Court under Ga. Code Ann. §27-2537, rape convictions punished by imprisonment are not subject to an automatic appeal. The *visible* record of Georgia juries in rejecting capital punishment for defendants convicted of rape – a rejection ratio of better than nine-to-one – therefore doubtless understates the true ratio. Nevertheless, even these figures are a weighty testimonial to the

[42]Brief for Petitioner in *Roberts v. Louisiana, supra* [No. 75-5844], Appendix A, at 1a-4a (filed Feb. 22, 1976); Brief for Petitioner in *Woodson v. North Carolina, supra*, [No. 75-5491], Appendix A, at 42-46 (filed Feb. 22, 1976) [No. 75-5491].

[43]*See* Appendix B. *infra*.

[44]*Coley, Eberheart, Hooks*, and the present case.

perceived inappropriateness of capital punishment for rape, upon the assumption that "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," *Gregg v. Georgia, supra*, 49 L.Ed.2d at 879 (plurality opinion).

Nor can the infrequency of death verdicts in rape cases be explained satisfactorily upon the theory that the ultimate punishment is being reserved for only the most aggravated rape offenses. To the contrary, numerous rapes that were far more aggravated than petitioner's have resulted in sentences of imprisonment. *See, e.g., Welch v. State*, Ga. Sup. Ct. No. 31374 (Sept. 28, 1976) (rape and forced subjection of the single complainant to unnatural sexual acts by three defendants; conduct described as "torture" and mockery of the complainant; eventual abandonment of the complainant by shoving her naked down a rocky bank into a creek); *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975) (rape, burglary, "physical abuse," stomping, and threats on complainant's life); *Hammock v. State*, 233 Ga. 733, 213 S.E.2d 618 (1975) (severe beating of complainant); *Crowder v. State*, 233 Ga. 789, 213 S.E.2d 620 (1975) (physical injuries to complainant requiring six stitches); *Woodward v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975) (abduction and beating). Ironically, where a death sentence *was* imposed in a rape case similar in many regards to petitioner's – rape, robbery and abduction, with little physical harm to the complainant, by a defendant who was a prison escapee with a prior capital felony conviction (apparently involving torture of the victim) – the Georgia Supreme Court reduced that sentence to life imprisonment with the otherwise unexplicated observation that "prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for

the offense of rape, rather than death." *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612, 617 (1974).

The same data referred to in *Woodson v. North Carolina, supra,* 49 L.Ed.2d at 956 (plurality opinion) as "indicating that the percentage of death sentences [among defendants convicted of murder] in many States was well below 20%," show, by comparison, that the percentage of death sentences among defendants convicted of rape was well below 4%.[45] For Georgia specifically, those figures show that there were 299 commitments under conviction for rape between July 1, 1964 and December 31, 1968; whereas, for the five calendar years encompassing these four-and-a-half fiscal years, eight men – or 2.68% – were sentenced to die for rape.[46] Perhaps the reluctance of juries in Georgia and elsewhere during recent decades to impose the death sentence for rape in more than a minute and arbitrarily selected fraction of cases reflects the phenomenon that "[statutory] punishments for rape are simply not in line with public perception of its seriousness."[47] Perhaps it represents a literal and

[45]Brief for Petitioners in *Aikens v. California,* 406 U.S. 813 (1972) [No. 68-5027], Appendix F, at 8f-11f.

[46]*Id.* at 9f.

[47]This was a "possible" conclusion suggested by two researchers who utilized psychophysical scaling techniques to measure the intensity of popular attitudes regarding various crimes and found that "rape without serious harm to the victim, manslaughter, and forcible rape were all rated as roughly equivalent." Hamilton & Rotkin, *Interpreting the Eighth Amendment: Perceived Seriousness of Crime and Severity of Punishment,* in BEDAU & PIERCE, eds., CAPITAL PUNISHMENT IN THE UNITED STATES (1976), at 502, 519. *Cf.* BOWERS, EXECUTIONS IN AMERICA 77 (1974):

> "By most standards, rape is a less serious offense than murder. It has been judged less serious by various population subgroups [citing SELLIN & WOLFGANG,

(continued)

intuitive application of the ancient *lex talionis* principle[48] manifesting itself as an unwillingness to declare life forfeit where no life has been taken.[49] Whatever the explanation, the behavior of juries as an indicator of the "evolving standards of decency that mark the

(footnote continued from preceding page)

> THE MEASUREMENT OF DELINQUENCY (1974)], it has been less severely punished by length of imprisonment [citing Tittle, *Crime Rates and Legal Sanctions,* 16 SOCIAL PROBLEMS 409 (1969), and Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence,* 18 SOCIAL PROBLEMS 200 (1970)], and it has been punishable by death in far fewer jurisdictions both within the United States . . . and abroad [citing Patrick, *The Status of Capital Punishment: A World Perspective,* 56 J. CRIM. L., CRIM. & POL. SCI. 397 (1965)]."

[48]Granucci remarks of the biblical *lex talionis*:

> "It is generally considered a law of retribution–the product of a vengeful deity. Envisioning neither mercy nor mitigation of punishment, the *lex talionis* is, by modern standards, extremely harsh; however, it does prescribe a maximum limit on punishment. '*Talio*' is Latin for 'equivalent to' or 'equal'. That the *lex talionis* requires punishment equal to the crime is made clear by a passage from the Book of Leviticus: 'If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered.' "

Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning,* 57 CAL. L. REV. 839, 844 (1969).

[49]As Prof. Packer has observed,

> "the retributive justification . . . seems to offer the strongest support for limiting the infliction of the death penalty to homicidal offenses. The command of the lex talionis is a simple one: an eye for an eye, a tooth for a tooth, a life for a life. The negative pregnant is equally simple: where a life has not been taken, a life should not be forfeit. Here is a doctrine of proportionality that can readily be grasped and easily applied, at least when the death penalty is at issue. Seen in that light, proportionality is neither too complicated nor too marginally relevant to be employed as a constitutional ideal."

Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1078 (1964).

process of a maturing society"[50] plainly signifies that rape – although a grave and repugnant crime – is not among those "crimes [which] are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death," *Gregg v. Georgia, supra,* 49 L.Ed.2d at 881.

C. History and Traditional Usage

The present status of the death penalty for rape in this country, described in the preceding subsections insofar as it is reflected in legislative enactments and jury verdicts, takes on added significance in a broader historical and social context. Several points deserve note here.

First, the extreme contemporary rarity of statutes authorizing capital punishment for rape offenses is the end product of a "trend both in this country and throughout the world against punishing rape by death," *Rudolph v. Alabama,* 375 U.S. 889 (1963) Mr. Justice Goldberg, dissenting from denial of certiorari). The "long-term trend away from the death penalty . . . [in] the reduction of the number of capital offenses,"[51] has

[50] *Trop v. Dulles, supra,* 356 U.S. at 100 (plurality opinion).

[51] Hartung, *Trends in the Use of Capital Punishment,* 284 ANNALS 8, 9, (1952).

been steadily occurring since the Eighteenth Century,[52] and has radically diminished the number of American jurisdictions which authorize the death penalty for rape from twenty a-half-century ago to four today (among which, only Georgia provides the death penalty for rape of an adult woman). *See* pages 37-43 *supra.*[53]

Internationally too, the death penalty for rape has atrophied dramatically, to the point of virtually universal abolition among civilized nations.[54] A United

[52] *See* Barrows, *Legislative Tendencies as to Capital Punishment,* 29 ANNALS 618, 620 (1907); McCafferty, *Major Trends in the Use of Capital Punishment,* 25 FED. PROB. 1, 16 (1961, No. 3); DiSalle, *Trends in the Abolition of Capital Punishment,* 1 TOLEDO L. REV. 1, 3-5 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 352-353 (Avon ed. 1968); Comment, *Cruel and Unusual Punishment–Constitutionality of the Death Penalty for Rape Where Victim's Life Neither Taken Nor Endangered,* 5 U. RICHMOND L. REV. 392, 394 n.18 (1971). For a description of the range of offenses once punished by death in this country, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 2-3 (1919); BEDAU, ed., THE DEATH PENALTY IN AMERICA 5-7 (rev. ed. 1967).

[53] Within the past decade, both the American Law Institute and the National Commission on Reform of the Federal Criminal Laws have recommended against the authorization of the death penalty for rape. THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW CRIMINAL CODE 307 (1970); AMERICAN LAW INSTITUTE, MODEL PENAL CODE §§213.1, 6.06 (Proposed Official Draft, 1962). *See Ralph v. Warden,* 438 F.2d 786, 791 (CA4 1970).

[54] The Court has considered the international acceptability of a punishment relevant to the question whether the penalty is violative of the Eighth Amendment. In *Trop v. Dulles,* 356 U.S. 86, 102 (1958) (plurality opinion), the Court remarked that the "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime," and it cited a United Nations survey which indicated that only two countries imposed denationalization as a penalty for desertion. *id.* at 103.

Nations survey of more than sixty countries (including most of the major nations of the world) found that by 1965 all but three countries outside the United States had ceased to employ capital punishment for this crime.[55] The three countries retaining the death penalty for rape were China (Taiwan), Malawi, and the Republic of South Africa.[56] A broader but less reliable study in Patrick in 1963 covered 128 countries and found nineteen apart from the United States that authorized capital punishment for rape; but this figure should be reduced by perhaps six on account of errors and

[55]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereinafter cited as UNITED NATIONS SURVEY] 40, 86. We put aside three countries (Japan, Philippines, Turkey) that punish rape capitally only if it is followed by the victim's death. *Ibid.*

There is a 1975 Report of the Secretary-General on Capital Punishment, CAPITAL PUNISHMENT, REPORT OF THE SECRETARY-GENERAL (E/5616) (1975), and the replies from the individual governments which formed the basis for this report have also been published, CAPITAL PUNISHMENT: INFORMATION FROM GOVERNMENTS COMPILED BY THE UNITED NATIONS SECRETARIAT (ST/SOA/118 (1972) [hereinafter cited as UNITED NATIONS GOVERNMENTS' REPLIES]. Unfortunately, the 1975 Report does not contain an updated list of the countries in the world which impose the death penalty for rape; and the seventy-nine replies from the individual governments do not always reveal what crimes, if any, the government punishes by death. But nothing in either the Report or the replies contradicts the information contained in the 1968 Survey.

[56]The 1960 United Nations survey (UNITED NATIONS SURVEY 40) lists four countries as retaining the death penalty for rape: China (Taiwan), Northern Rhodesia, Nyasaland, and the Republic of South Africa. Nyasaland became Malawi upon its independence in 1964. Northern Rhodesia became Zambia, and abolished the death penalty for rape by 1965. UNITED NATIONS SURVEY 86.

subsequent abolition.[57] Moreover, Patrick's data concerning the actual use of the death penalty suggest that

[57]Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 398-404 (1965). The countries are: Afghanistan, Australia, Basutoland, Bechuanaland, People's Republic of China, Gabon, Jordan, Republic of Korea, Malagasy Republic, People's Republic of Mongolia, Niger, Northern Rhodesia [now Zambia], Nyasaland [now Malawi], Saudi Arabia, Senegal, Sierra Leone, Republic of South Africa, Turkey, and the U.S.S.R. However, Australia and the U.S.S.R., which Patrick lists, do not authorize the death penalty for rape according to the 1968 United Nations survey. Turkey, which Patrick also lists, was found by the United Nations to punish rape with death only if the rape victim dies. On the other hand, Patrick does not list China (Taiwan), as the United Nations survey does. These errors decrease Patrick's by a total of two. Moreover, Zambia [formerly Northern Rhodesia] abolished the death penalty for rape by 1965, *see* note 56 *supra.* Patrick's total of nineteen countries must therefore be reduced by at least three. Also, the responses from United Nations countries which formed the basis of the 1975 Secretary-General's report on the death penalty, while sketchy, incomplete, and in some cases ambiguous, indicate that three more of the jurisdictions listed by Patrick may have abolished the death penalty for rape. The response from Afghanistan stated that the death penalty has been reserved for "premeditated political and military crimes." UNITED NATIONS GOVERNMENTS' REPLIES at 5. The response from Jordan implied that capital punishment was now only imposed for murder in that country ("With regard to mitigation of the sentence. it is the practice of the courts in cases where the motive for the murder was a matter relating to honour, to regard this motive as an extenuating circumstance . . . .", *id.* at 35-36). The response from Sierra Leone suggests a *de facto* abolition of the death penalty for rape: "The death sentence is still passed though this is mandatory only in treason and murder cases. The death penalty is retained more in theory as only very few people have been executed," *id.* at 67.

almost no one in the world is actually executed for rape outside of the United States and South Africa.[58]

Second, the trend toward actual disuse of the death penalty for rape in this country has been precipitous during the past thirty years, as the following figures show:

Year	*Number of Executions for Rape*[59]		
	White	*Black*	*Total*
1946	0	22	22
1947	2	21	23
1948	1	21	22
1949	0	10	10
1950	4	9	13
1951	2	15	17

(continued)

[58]Patrick provides figures for the average yearly number of executions (1958-1962) *for all crimes* for each country except the People's Republics of China and Mongolia, and Sierra Leone. None of the countries for which figures are given executed more than two men a year for all crimes, except Basutoland (3), Korea (68), Northern Rhodesia (6.5) [which has now abolished the death penalty for rape (*see* note 56 *supra*)] and the Republic of South Africa (100). It is known that fewer than 10 percent of South Africa's 100 executions yearly are for rape, Kahn, *The Death Penalty in South Africa,* 18 TYDSKRIF VIR HENDENDAAGSE ROMEINS-HOLLANDSE REG 108, 116-117 (1970). It has been reported that, between 1947 and 1969, 844 rape convictions of black South Africans resulted in 121 death sentences, while 288 rape convictions of white South Africans resulted in 3 death sentences. *The Manchester Guardian Weekly,* August 14, 1971, p. 4.

[59]UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (November 1975) 16-17. This source covers the years through 1974. There were no executions in the United States during calendar year 1975.

Year	*Number of Executions for Rape*		
	White	*Black*	*Total*
1952	1	11	12
1953	1	6	7
1954	1	8	9
1955	1	6	7
1956	0	12	12
1957	2	8	10
1958	0	7	7
1959	1	7	8
1960	0	8	8
1961	1	7	8
1962	2	2	4
1963	0	2	2
1964	3	3	6
1965	0	0	0
1966	0	0	0
1967	0	0	0
1968	0	0	0
1969	0	0	0
1970	0	0	0
1971	0	0	0
1972	0	0	0
1973	0	0	0
1974	0	0	0
1975	0	0	0

Third, as these statistics indicate, the overwhelming majority of defendants executed for the crime of rape in this country during the past thirty years have been black. Indeed, since 1930, when reliable statistics began to be kept by the federal government, 48 whites, 405 blacks, and 2 members of other minorities have been put to death for this crime.[60] On July 2, 1976, of the

[60]*Ibid.*

twenty-eight persons under sentence of death for rape in the United States, twenty-one were black.[61]

There is historical evidence that, in Georgia, the death penalty. for rape was specifically devised as a punishment for the rape of white women by black men.[62] Over the years, one of the most frequent and

[61]Of the three persons on Death Row in Georgia for rape, *see* note 41 *supra*, two were black, Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae in *Gregg v. Georgia*, supra [No. 74-6257], Appendix A, at 1a-4a (filed Feb. 22, 1976); both of the persons on Death Row in Florida for sexual battery were white, Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae in *Proffitt v. Florida, supra* [No. 75-5706], Appendix A, at 1a-11a (filed Feb. 22, 1976); seven of the eight persons on Death Row in North Carolina for first degree rape were black, Brief for Petitioner in *Woodson v. North Carolina, supra* [No. 75-5491], Appendix A, at 42-46 (filed Feb. 22, 1976); twelve of the fourteen persons on Death Row in Louisiana for aggravated rape were black, Brief for Petitioner in *Roberts v. Louisiana, supra* [No. 75-5844], Appendix A, at 1a-4a (filed Feb. 22, 1976). The sole Mississippian condemned for rape was white, *see* note 40 *supra*.

[62]Appendix A, *infra*, reprinted from Brief for Petitioner in *Jackson v. Georgia*, 408 U.S. 238 (1972) [No. 69-5030], Appendix B, traces the history of the punishment for rape in Georgia since the days of slavery. Prior to the Civil War, rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment. Rape committed by a slave or a free person of color upon a white woman was punishable by death. One year after the abolition of slavery, however, a facially color-blind statute was enacted, giving juries discretion to sentence any man convicted of rape to either death or not more than twenty years imprisonment. (It was not until 1960 that the third option of life imprisonment was added to these two alternatives.) Despite the ostensible neutrality of the statute, the post-Civil War racial sentencing pattern varied little from the ante-bellum pattern. *See* page 56 *infra*.

insistent criticisms of ostensibly color-blind rape statutes was that they were administered discriminatorily so that blacks were disproportionately executed for rape.[63] Recent statistical studies have proved the

[63]*See e.g.*, Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. 234, 243 (1926) ("[t]he fact that all but one of these states (Nevada) [that authorize the death penalty for rape] is located in the southeastern part of the United States would indicate that capital punishment is still used for this offense because it is occasionally committed by Negroes upon white women, a crime which arouses the most violent indignation on the part of the whites, and which they accordingly treat with severity"); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 10 (1952) (capital punishment for rape "is a penalty directed primarily against Negroes in southern states"); *see also id.* at 14-16; BEDAU, THE DEATH PENALTY IN AMERICA 413 (rev. ed. 1967) ("of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes. In these six states, the very existence of rape as a crime with an optional death penalty is, in the light of the way it has been used, strong evidence of an original intent to discriminate against non-whites. This was probably the purpose behind the decision in Tennessee in 1915 to abolish capital punishment for murder and treason, but to retain it for rape"); Wolfgang & Riedel, *Rape, Racial Discrimination, and the Death Penalty*, in BEDAU & PIERCE, eds., CAPITAL PUNISHMENT IN THE UNITED STATES (1976), at 99, 118-119 (describing the results of a study in which rape convictions were factored to determine the impact of race and thirty-four non-racial variables on sentence:

> "Based upon a refined statistical analysis of rape convictions in states where rape has been a capital crime, the two analyses show that there has been a patterned, systematic and customary imposition of the death penalty. Far from being 'freakish' or capricious, sentences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity. Moreover, the systems of criminal justice in the jurisdictions studied have inflicted the death penalty on blacks in such disproportions without statutory or other legally acceptable bases. Thus, with the benefit of a carefully designed and objectively analyzed study of these conditions, it can be concluded that the significant racial differentials found in the imposition of the death penalty [for rape] are indeed produced by racial discrimination.")

fact of discrimination conclusively, both generally[64] and for Georgia in particular.[65] We make this point – although petitioner himself is white – because it plainly demonstrates the nature and extent of the acceptance which the death penalty for rape has historically enjoyed in Georgia and in this country. The roots of that acceptance have lain in racial, not penal, considerations. In light of the infinitesimal number of persons now condemned for rape, it is clear that capital punishment for this crime is not "still widely accepted," *Trop v. Dulles, supra,* 356 U.S. at 99 (plurality opinion), in any case. But where race does not enter the picture, its acceptance is postively aberrational. If executed, petitioner will be the fourth white man put to death for rape in the State of Georgia since the federal government began keeping execution statistics in 1930. During the same period of more than forty-five years, Georgia has electrocuted fifty-eight black men for rape.[66]

This freakishly rare and racially disproportionate imposition of the death penalty for the crime of rape in Georgia has insulated an excessive punishment from the scrutiny of enlightened public conscience. For both the public and a democratically elected legislature can easily tolerate the rare, random occurrence of a punishment which, if applied regularly, would be intolerable. That is

[64] *Ibid. See also* Wolfgang & Riedel, *Race, Judicial Discretion and the Death Penalty,* 407 ANNALS 119 (1973).

[65] Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia,* 45 AM. J. ORTHOPSYCHIATRY 658 (1975).

[66] UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (November 1975) 21.

just the kind of penalty at which a constitutional prohibition of cruel and unusual punishments must aim. Whether it happen by accident or design that penalties of this kind fall most harshly upon the poor and upon racial minorities, the supposed "acceptances" of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it. The death penalty for rape is tolerated at all today only because it is so rarely inflicted.

That the death penalty for rape is rare and unusual permits local political acceptance of its cruelty, but, for that very reason, requires judicial condemnation under the Eighth Amendment.[67] Rare and uneven usage which

[67] Although the victim in this case was not physically harmed, apart from the rape itself, *see* pages 18, 22, *supra,* petitioner's Eighth Amendment contention in this case is not grounded upon the assumption that the "victim's life was neither taken nor endangered," *Ralph v. Warden,* 438 F.2d 786, 787 (CA4 1970). This is so both because contemporary standards of decency have repudiated death as a punishment for rape regardless of the threat to life presented by the crime (it should be noted, also, that no American jurisdiction makes attempted murder a capital offense, Comment, *Constitutional Law: Capital Punishment for Rape Constitutes Cruel and Unusual Punishment When No Life Is Taken or Endangered,* 56 MINN. L. REV. 95, 106 (1971)), and because the "endangering life" standard appears to be so broad as to be unworkable. "In any rape there is to a certain extent an *endangering of life,* as there is in any violent crime." Note, *Criminal Law–The Limited Application of the Eighth Amendment's Cruel and Unusual Punishment Clause to the Death Penalty,* 7 WAKE FOREST L. REV. 494, 495 (1975) (emphasis in original).

> "There is a sense in which life is always endangered by sexual attack, just as there is a sense in which it is always endangered by robbery, or by burglary of a dwelling or by any physical assault. The threat of violence is not the less a threat by being conditional, and violence always carries the possibility of a fatal encounter."

Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1077 (1964). *See also* Comment, *supra,* 56 MINN.

(continued)

evades the public conscience politically demands a supervision by the public conscience, speaking through the courts, which the Eighth Amendment promises. *Furman v. Georgia,* 408 U.S. 238 (1972); *Gregg v. Georgia, supra,* 49 L.Ed.2d at 883; 887 n.47 (plurality opinion). This is the more true because, we submit, such usage itself affronts "the dignity of man," *Trop v. Dulles, supra,* 356 U.S. at 100 (plurality opinion), and those cherished principles of fair and regular, nonarbitrary treatment of the citizen which the Eighth Amendment, no less than the Fourteenth, supposes. In the unanimous and overwhelming judgment of history, modern legislatures, and contemporary juries, the death penalty for rape is "no longer consistent with our self-respect."[68]

(footnote continued from preceding page)
L. REV. at 104-105; Comment, *Cruel and Unusual Punishment–The Constitutionality of the Death Penalty for Rape Where Victim's Life Neither Taken Nor Endangered,* 5 U. RICHMOND L. REV. 392, 399 n.43 (1971). *Compare Ralph v. Warden, supra,* to *Harris v. Stephens,* 361 F.2d 888, 894-895 (CA8 1966); *Mitchell v. Stephens,* 353 F.2d 129, 135 (CA8 1965); *Maxwell v. Stephens,* 348 F.2d 325, 332 (CA8 1965).

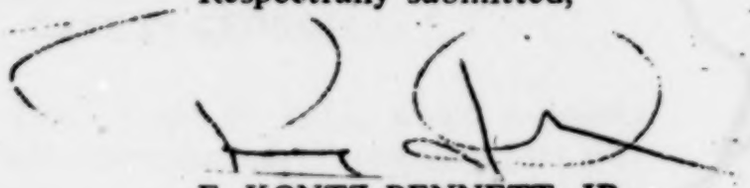
[68]Lord Chancellor Gardiner, in 268 HANSARD, PARLIAMENTARY DEBATES (5th series) (Lords, 43d Parl., 1st Sess., 1964-1965), 703 (1965):

> "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."

CONCLUSION

Petitioner's death sentence for rape is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Georgia Supreme Court should therefore be reversed.

Respectfully submitted,



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APPENDIX A

[This Appendix appeared as Appendix B to Brief for Petitioner, in *Jackson v. Georgia*, No. 69-5030 (408 U.S. 238 (1972)) at pp. 1b-6b.]

HISTORY OF PUNISHMENT FOR RAPE IN GEORGIA

The Georgia Penal Code of 1811, which expressly applied to free white persons only,[1a] provided that rape would be punished by imprisonment at hard labor for not less than seven nor more than sixteen years.[2a] An Act "To establish a Tribunal for the trial of Slaves within this State," enacted on the same date as the Penal Code December 16, 1811, in effect provided that slaves could be sentenced to death for *any crime* at the discretion of a tribunal for slaves.[3a] On November 23,

[1a] "*And be it further enacted,* That the operation of this law, and all parts thereof shall be construed to extend to free white persons only." Penal Code of 1811, §67, printed in LAMAR, COMPILATION OF THE LAWS OF GEORGIA (1821) [hereafter cited as LAMAR] 552.

[2a] "*Be it further enacted,* That if any man shall have or take carnal knowledge of any woman by force, or against her will or consent, every such person, his aiders or abettors, shall, upon conviction thereof, be sentenced and confined to hard labour, for and during a term not less than seven years, nor more than sixteen." Penal Code of 1811 §60, LAMAR 551.

[3a] "The Act provided that when a complaint was made to a justice of the peace of "any crime having been committed by any slave or slaves," he should summon two other justices to try the case. If it appeared to the justices that the crime should be punished by death, a trial before a jury of "twelve free white persons" was to be held. If the jury returned a verdict of guilty, "the court shall immediately pronounce sentence of death by hanging, or such other punishment not amounting to death . . . ." Ga. Acts of 1811, No. 503, at 979-800.

1815, the Act of 1811 which established a tribunal for the trial of slaves, was made applicable to all offenses committed by "free persons of colour."[4a] On December 18, 1816, the penalty for rape in the Penal Code applicable to whites was changed to imprisonment for not less than two nor more than twenty years, and a section was added punishing attempted rape by imprisonment for not less than one nor more than five years.[5a] The following day, December 19, 1816, an act was passed which expressly provided that the punishment of slaves and "free persons of colour" for the crime of rape or attempted rape of a free white female should be death.[6a]

[4a]"BE it enacted by the Senate and House of Representatives of the state of Georgia, in General Assembly met, and is hereby enacted by the authority of the same, That an act passed at Milledgeville, on the 16th day of December, 1811, entitled An act to establish a tribunal for the trial of slaves within this state; the court therein established is hereby made a tribunal for offences committed by free persons of colour, to all intents and purposes, as if the words free persons of colour had been inserted in the caption, and every section of the said act to establish a tribunal for the trial of slaves within this state." Ga. Acts of 1815, No. 504, LAMAR 800.

[5a]"Rape shall be punished by imprisonment at hard labour in the penitentiary, for a term not less than two years, nor longer than twenty years, as the jury may recommend.

"An attempt to commit rape shall be punished by imprisonment at hard labour in the penitentiary, for a term not less than one year, nor longer than five years, as the jury may recommend." Penal Code of 1816 §§33-34, at LAMAR 571.

[6a]"BE it enacted by the Senate and House of Representatives of the General Assembly of the state of Georgia, and it is hereby enacted by the authority of the same, That the following shall be considered as capital offences, when committed by a slave or free person of colour: . . . committing a rape, or attempting it, on a free white female: . . . every and each of these offences shall, on conviction, be punished with death." Ga. Acts of 1816, No. 508, §1, at LAMAR 804.

A Code of the State of Georgia published in 1861 shows that sometime between the years 1816 and 1861, the rape provisions were again amended. Rape by a white person upon a free white female remained punishable by imprisonment for no less than two nor more than twenty years; rape by a white person upon a slave or free person of color was made punishable "by fine and imprisonment at the discretion of the court;" an assault with intent to commit rape remained punishable by one to five years imprisonment.[7a] Rape upon a free white female by a slave or free person of color remained punishable by death.[8a] However, attempted rape upon a free white female was made punishable by death "or such other punishment as the court may prescribe, proportionate to the offence and calculated to prevent the occurrence of like offences in the future."[9a]

[7a]"Rape is the carnal knowledge of a female, whether free or slave, forcibly and against her will.

"Rape on a free white female shall be punished by an imprisonment at labor in the penitentiary for a term not less than two years nor longer than twenty years. If committed upon a slave, or free person of color, by fine and imprisonment, at the discretion of the court.

"An assault with intent to commit a rape, shall be punished by an imprisonment at labor in the penitentiary for a term not less than one year nor longer than five years." Penal Code §§4248-4250, printed in CLARK, COBB & IRWIN, CODE OF THE STATE OF GEORGIA (1861) 824.

[8a]"The following offences, when committed by a slave or free person of color, shall be punished, on conviction, with death, viz: . . . rape upon a free white female." Penal Code for Slaves and Free Persons of Color, §4704, printed in *id.* at 918.

[9a]"The following offences, when committed by a slave or free person of color, shall be punished in the discretion of the court, either by death or such other punishment as the court may prescribe, proportionate to the offence and calculated to prevent the occurrence of like offences in future, viz: Attempt to commit a rape upon a free white female . . ." Penal Code for Slaves and Free Persons of Color, §4708, in *id.* at 918.

The Georgia Constitution of 1865, enacted November 8, 1865, abolished slavery. On March 20, 1866, the rape provision of the Penal Code applicable to whites[10a] was amended. The crime of rape was reduced below a felony and made punishable by "a fine not to exceed one thousand dollars, imprisonment not to exceed six months, whipping not to exceed thirty-nine lashes, to work on a chain gang on the public works not to exceed twelve months, and any one or more of these punishments . . . in the discretion of the Judge."[11a] This amended provision was repealed on December 11, 1866, and the prior provisions of the code relating to punishment were reinstated.[12a]

[10a] §4248. *See* note 7a *supra*.

[11a] "The General Assembly of the State of Georgia do enact, That from and after the passage of this Act the crimes defined in the following Sections of the Penal Code as felonies, and punishable by imprisonment in the Penitentiary, shall henceforth be reduced below felonies, and punished in the manner hereinafter set forth, viz: Sections . . . 4248 . . . . .

"5. SEC. II. That all other crimes designated in the Penal Code punishable by fine and imprisonment, or either, shall be likewise punishable in the manner hereinafter set forth, that is to say, the punishment for any of the aforesaid crimes, hereafter committed, shall be a fine not to exceed one thousand dollars, imprisonment not to exceed six months, whipping not to exceed thirty-nine lashes, to work in a chain gang on the public works not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the Judge." Ga. Acts 1866, No. 236, p. 233.

[12a] "SECTION I. *Be it enacted, etc.* That from and after the pasage of this act, so much of the first section of an act entitled an act to alter and amend the Penal Code of Georgia, passed March 12th, 1866, as relates to section 4248 of the Code of Georgia, be and the same is hereby repealed, and that said section 4248 be of force as before the passage of said act.

"SEC. II. Repeals conflicting laws." Ga. Acts 1866, No. 209, p. 151.

On December 15, 1866, a new rape statute was enacted which made rape punishable by death or by imprisonment for no less than one nor more than twenty years at the discretion of the jury, and which made assault with intent to commit rape punishable by imprisonment for no less than one nor more than twenty years.[13a]

The legislative history of the Act passed on December 15, 1866, is not especially instructive. The bill as it was first read in the Georgia House of Representatives provided that all rape shall be punished with death.[14a] Prior to the third reading in the House,

[13a] "SECTION I. *Be it enacted, etc.*, That from and immediately after the passage of this act, the crime of rape, in this State, shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be the same as for an assault with intent to commit a rape. An assault with intent to commit rape, in this State, shall be punished by an imprisonment at hard labor in the Penitentiary of this State, for a term not less than one nor longer than twenty years.

"SEC. II. Repeals conflicting laws." Ga. Acts 1866, No. 210, p. 151.

As codified in the Code of 1933, the penalty provision reads: "The crime of rape shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than 20 years." Ga. Code Ann. §26-1302 (1953).

[14a] "Sec. 1st. The General Assembly of Georgia do enact, That from and immediately after the passage of this act, the crime of Rape in this State shall be punished with death. An assault with intent to commit a Rape in this State shall be punished by an imprisonment at hard labor in the Penitentiary of this State for a term not less than one nor longer than twenty years.

"Sec. 2d. And be it further enacted that all laws and parts of laws militating against this Act be and the same are thereby repealed." Humphries of Lincoln, A Bill to be entitled An Act to alter and change the 4249th and 4250th paragraphs of the Code of Georgia, in custody of Georgia State Archives, Atlanta, Georgia.

the provision for the alternative punishment of imprisonment was written into the bill, and the bill was passed the House with this amendment on November 26, 1866.[15a] The bill then passed the Senate without further amendment. The Journals of both the Georgia House of Representatives and the Georgia Senate reveal that the Georgia legislature was not engaged in a comprehensive reform of the Georgia penal law, but passed this bill concerning rape at a time when it was considering a variety of unrelated subjects.[16a]

In 1960, the penalty for rape was amended to add the alternative of life imprisonment to the already existing choices.[17a] In the comprehensive revision of the penal code in 1968, the language was revised, but not its effect.[18a]

[15a] "... [U]nless the defendant is recommended to mercy by the jury in which case the punishment shall be the same as for an assault with intent to commit a rape." *Ibid.*

[16a] *See Journal of the Senate of the State of Georgia* (1866); *Journal of the House of Representatives of the State of Georgia,* commenced November 1, 1866 (1866).

[17a] "The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life: Provided, however, the jury in all cases may fix the punishment by imprisonment and labor in the penitentiary for not less than one year nor more than 20 years." Ga. Acts 1960, No. 587, p. 266; Ga. Code Ann. §26-1302 (Supp. 1970).

[18a] "A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." Ga. Acts 1968, pp. 1249, 1299; Ga. Code Ann. §26-2001 (1970 Revision) (effective July 1, 1969).

APPENDIX B

RAPE CASES ADJUDICATED UNDER THE 1973 GEORGIA CAPITAL PUNISHMENT STATUTE

Since its decision in *Coley v. State*, 231 Ga. 829, 204 S.E.2d (1974), the Georgia Supreme Court has reviewed a number of rape convictions, but apart from *Coley*, it has only considered death sentences in the present case *Coker v. State*, 234 Ga. 555, 216 S.E.2d 782 (1975)); *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974), *pending here on petition for certiorari as Eberheart v. Georgia*, No. 74-5174; and *Hooks v. State*, 233 Ga. 149, 210 S.E.2d 668 (1974), *pending here on petition for certiorari as Hooks v. Georgia*, No. 74-5954.[1b]

A review of the volumes of appellate reports of the Georgia Supreme Court and Courts of Appeals following the report of the *Coley* decision reveals that fifty-eight rape cases have been adjudicated on appeal. In ten cases, the Court's opinion indicates that the date of the crime was prior to the March 28, 1973, effective date of the 1973 Georgia capital punishment statute.[2b] However, in six cases where the date of the crime is not

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[1b] In *Gibson v. State*, ___ Ga. ___, 226 S.E.2d 63 (1976), No. 76-5231, *certiorari denied*, November 29, 1976, the death penalty was imposed both for the rape and murder of the victim; the Supreme Court of Georgia vacated the death penalty for rape because that felony formed the predicate of the felony-murder conviction.

[2b] *Burnett v. State*, 236 Ga. 597, 225 S.E.2d 28 (1976); *Parmer v. State*, 236 Ga. 507, 224 S.E.2d 375 (1976); *Burnett v. State*, 234 Ga. 741, 218 S.E.2d 4 (1975); *Furgerson v. State*, 234 Ga. 594, 216 S.E.2d 845 (1975); *Clemmons v. State*, 233 Ga. 187, 210 S.E.2d 657 (1974); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974); *Jones v. State*, 232 Ga. 762, 208 S.E.2d 850 (1974); *Estes v. State*, 232 Ga. 703, 208 S.E.2d 806 (1974); *Hicks v. State*, 232 Ga. 393, 207 S.E.2d 30 (1974); *Godbee v. State*, 232 Ga. 259, 206 S.E.2d 432 (1974).

revealed in the appellate opinion, the indictment reveals that the crime occurred before March 28, 1973.[3b]

In seventeen cases, it is clear from the Court's opinion that the crime of rape occurred after March 28, 1973, but that the jury or trial court imposed a sentence of life imprisonment.[4b] Additionally, in twenty-one cases where the date of the crime is not revealed in the appellate opinion, the indictment reveals that the crime occurred after March 28, 1973.[5b]

[3b]*Jones v. State*, 235 Ga. 155, 218 S.E.2d 899 (1975); *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975); *Nealey v. State*, 233 Ga. 326, 211 S.E.2d 286 (1974); *Jones v. State*, 232 Ga. 324, 206 S.E.2d 481 (1974); *Robinson v. State*, 232 Ga. 123, 205 S.E.2d 210 (1974); *Howard v. State*, 231 Ga. 877, 204 S.E.2d 629 (1974).

[4b]*Welch, Swain & Harris v. State*, Ga. Sup. Ct. No. 31374 (Sept. 28, 1976); *Atkins v. State*, 236 Ga. 624, 225 S.E.2d 7 (1976); *McNeese v. State*, 236 Ga. 26, 222 S.E.2d 318 (1976); *Evans v. State*, 235 Ga. 396, 219 S.E.2d 725 (1975); *Woodard v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975); *Jessen v. State*, 234 Ga. 791, 218 S.E.2d 52 (1975); *Nations v. State*, 234 Ga. 709, 217 S.E.2d 287 (1975); *Zilinmon v. State*, 234 Ga. 535, 216 S.E.2d 830 (1975); *Lynch v. State*, 234 Ga. 446, 216 S.E.2d 307 (1975); *Long v. State*, 233 Ga. 926, 213 S.E.2d 853 (1975); *Crowder v. State*, 233 Ga. 789, 213 S.E.2d 620 (1975); *Hammock v. State*, 233 Ga. 733, 213 S.E.2d 618 (1975); *Milton Jones & Moore v. State*, 233 Ga. 662, 212 S.E.2d 832 (1975) (opinion indicates that a third co-defendant, David Jones, was also convicted, but did not appeal with his two co-defendants, 212 S.E.2d at 832); *Wanzer v. State*, 232 Ga. 523, 207 S.E.2d 466 (1974).

[5b]*Harris v. State*, 236 Ga. 719, 225 S.E.2d 237 (1976) (Dougherty County Superior Court Indictment No. 40139; crime–Oct. 19, 1975); *Parmer v. State*, 236 Ga. 507, 224 S.E.2d 375 (1976) (Clayton County Superior Court Indictment No. 8-13592; crime–Dec. 12, 1974); *Curtis v. State*, 236 Ga. 362, 223 S.E.2d 721 (1976) (Chatham County Superior Court Indictment Nos. 23015 & 23016; crime–Aug. 6, 1974); *Smith & Bickers v. State*, 235 Ga. 852, 221 S.E.2d 601 (1976) (Clayton County Superior Court Indictment No. 9-19718; crime–July 27,

(continued)

Thus, in the forty-two rape cases reviewed by the Georgia Supreme Court arising under the 1973 capital punishment statute, the death penalty has been imposed in four cases (and in one of these, it was vacated as disproportionate by the Supreme Court of Georgia, see *Coley v. State, supra*), and a sentence of imprisonment

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(footnote continued from preceding page)

1973); *Watson v. State*, 235 Ga. 461, 219 S.E.2d 763 (1975) (Cobb County Superior Court Indictment No. 5829; crime–Dec. 8, 1973); *McFall v. State*, 235 Ga. 105, 218 S.E.2d 839 (1975) (Clayton County Superior Court Indictment Nos. 8-13040 & 8-13072; crime–April 28, 1974); *Wood v. State*, 234 Ga. 758, 218 S.E.2d 47 (1975) (Clarke County Superior Court Indictment No. 12613; crime–Mar. 13, 1974); *Thomas v. State*, 234 Ga. 635, 217 S.E.2d 152 (1975) (Clarke County Superior Court Indictment No. 12698; crime–June 4, 1974); *Smith v. State*, 234 Ga. 320, 215 S.E.2d 687 (1975) (Clayton County Superior Court Indictment No. 8-12621; crime–Nov. 23, 1973); *Williams v. State*, 234 Ga. 258, 215 S.E.2d 260 (1975) (Montgomery County Superior Court Indictment No. 6-229; crime–June 5, 1973); *Ellard & Whittier v. State*, 233 Ga. 640, 212 S.E.2d 816 (1975) (Fulton County Superior Court Indictment No. A-19315; crime–Nov. 12, 1973); *Curry v. State*, 233 Ga. 455, 211 S.E.2d 746 (1975) (DeKalb County Superior Court Indictment No. _____; crime–June 1, 1973); *Wimberly v. State*, 233 Ga. 386, 211 S.E.2d 281 (1974) (Fulton County Superior Court Indictment Nos. A-20121, A-20122, & A-20123); *Muckle v. State*, 233 Ga. 337, 211 S.E.2d 361 (1974) (Clarke County Superior Court Indictment No. 12610; crime–Mar. 29, 1974); *Price v. State*, 233 Ga. 332, 211 S.E.2d 290 (1974) (Gwinnett County Superior Court Indictment No. 9529; crime–Nov. 24, 1973); *Hunt v. State*, 233 Ga. 329, 211 S.E.2d 288 (1974) (Chatham County Superior Court Indictment No. 22-334; crime–Nov. 15, 1973); *Allen v. State*, 233 Ga. 200, 210 S.E.2d 680 (1974) (Fulton County Superior Court Indictment Nos. A-19028 & A-19029; crime–July 25, 1973); *Mack v. State*, 233 Ga. 200, 210 S.E.2d 680 (1974) (Fulton County Superior Court Indictment Nos. A-19028 & A-19029; crime–July 25, 1973); *Rowe v. State*, 232 Ga. 700, 208 S.E.2d 500 (1974) (Fulton County Superior Court Indictment No. A-17193; crime–May 1, 1973).

has been imposed in thirty-eight cases. This estimate tends to understate the proportion of rape cases in which a sentence of imprisonment rather than death is imposed, however, since while there is mandatory appeal of all death cases, *see* Ga. Code Ann. §27-2537(a) (1975 supp.), there is no guarantee that any appeal will be taken in cases where the sentence is non-capital.[6b]

[6b]In *Jones v. State*, 233 Ga. 662, 212 S.E.2d 832 (1975), for example, the Supreme Court of Georgia indicates that one of the three co-defendants convicted of rape and sentenced to imprisonment has not taken an appeal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-5444

EHRLICH ANTHONY COKER,
Petitioner,

v.

GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1976

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EHRLICH ANTHONY COKER,
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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 234 Ga. 555, 216 S.E. 2d 782 (1975).

STATEMENT OF THE CASE

On September 2, 1974, three inmates escaped from Ware Correctional Institution near Waycross, Georgia.[1] (A. 80-82). One of the escapees was Ehrlich Coker, the petitioner. (A. 102). Armed with a three-foot long board, the petitioner entered the nearby home of Allen and Elnita Carver, both of whom were sixteen years old. (A. 112, 114, 167, 326). He proceeded to tie up Mr. Carver, steal Mr. Carver's wallet containing $20.30, and rape Mrs. Carver. (A. 114-117, 168-174).

Having armed himself with a steak knife soon after gaining entry to the home, the petitioner abducted Mrs. Carver and fled in the Carvers' automobile. (A. 121, 176). Apprehended approximately fifteen miles away, the petitioner was still armed with the knife and had not released Mrs. Carver as he promised.[2] (A. 208-209).

Charged with armed robbery,[3] rape,[4] kidnapping,[5] motor vehicle theft,[6] and escape,[7] petitioner was tried November 19-22, 1974, in the Superior Court of Ware County.

---

[1] Waycross is approximately 75 miles northwest of Jacksonville, Florida.

[2] At the Carver home, the petitioner told Mr. Carver that Mrs. Carver would be released at a gas station in Waresboro. (A. 121, 176). After passing through Waresboro, Mrs. Carver asked if she would be released. The petitioner laughed and responded, " 'When we run out of gas . . . I reckon we'll both get out and start walking.' " (A. 177-78).

[3] Ga. Code Ann. §26-1902 (1972 Rev.).

[4] Ga. Code Ann. §26-2001 (1972 Rev.).

[5] Ga. Code Ann. §26-1311 (1972 Rev.).

[6] Ga. Code Ann. §26-1813(a)(1) (1972 Rev.).

[7] Ga. Code Ann. §26-2501 (1972 Rev.).

Pursuant to his special plea of insanity,[8] on November 19, 1974, a jury found the petitioner competent to stand trial. (A. 75-76). Trial on the general issues began on the morning of the 20th before a second jury. (A. 77). The petitioner was found guilty of each charge on November 21, 1974. (A. 265).

The sentencing phase of the trial began the next morning, before the same jury that returned the guilty verdicts.[9] (A. 266).

Evidence was introduced to show that on December 5, 1971, the petitioner and Phillip Echols raped and stabbed to death Sue Ann Wick.[10] (A. 285-86). Less than eight months later petitioner and Glenn Stacy kidnapped and raped sixteen-year-old Susan Lorrine Jones. (A. 261, 279-80). Petitioner, leaving Stacy behind, took Ms. Jones to an adjoining county where he again raped her. (A. 261, 280). In addition to raping Ms. Jones, he stripped off her clothes, severely beat her with a piece of wood, dragged her into a wooded area and left her for dead.[11] (A. 261, 280, 310).

---

[8] *See* Ga. Code Ann. §27-1502 (1972 Rev.).

[9] The procedure that Georgia follows in capital cases is familiar to the Court. *See Gregg v. Georgia*, ——— U.S. ———, 96 S. Ct. 2909, 2920-2922 (1976).

[10] Petitioner entered pleas of guilty in the Superior Court of Clayton County to a two count indictment charging rape and murder. He was sentenced to twenty years imprisonment and life imprisonment, respectively. (A. 308-309). At Echols' trial, Petitioner admitted his involvement but maintained that Echols stabbed Ms. Wick; Echols, on the other hand, maintained that petitioner did the stabbing. *See Echols v. State*, 231 Ga. 633, 634, 203 S.E. 2d 165, 166 (1974).

[11] Petitioner entered pleas of guilty in the Superior Court of Richmond County to a two count indictment charging kidnapping and rape. He was sentenced to twenty years imprisonment and life imprisonment, respectively. (A. 306-307). He entered pleas of guilty in the Superior Court of Taliaferro County to a two count indictment charging aggravated assault and rape and was sentenced to eight years imprisonment and life imprisonment, respectively. (A. 310-312).

After the presentation of evidence,[12] the trial court charged the jury on punishment. The trial court first explained the range of punishment for armed robbery and rape and then charged the jurors that they must find beyond a reasonable doubt one or more statutory aggravating circumstances before the penalty of death would be authorized. (A. 298). The jury was instructed on the relevant statutory aggravating circumstances [13] as follows:

> "Now, as to Count 1, wherein the defendant has been found guilty of Armed Robbery, you may consider the following aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed:
>
> "1. The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony.
>
> "Now, as to Count 2, wherein the defendant has been found guilty of Rape, you may consider one or more of the following aggravating circumstances, which you must find beyond a reasonable doubt before the death penalty can be imposed under Count 2:
>
> "1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony.
>
> "2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment." (A. 298-299).

The jury was also given instructions on non-statutory mitigating and aggravating circumstances. (A. 300).

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[12] The petitioner did not offer any evidence. (A. 292).
[13] *See* Ga. Code Ann. §27-2534.1(b)(1), (2) (Supp. 1976).

The jury recommended mercy on the armed robbery count, resulting in a sentence of life imprisonment. (A. 314, 316). On the rape count, the jury found both aggravating circumstances and returned a sentence of death. (A. 315, 317-318).

The Supreme Court of Georgia affirmed the petitioner's conviction and sentence of death for rape. *Coker v. State*, 234 Ga. 555, 216 S.E. 2d 782 (1975). This Court granted certiorari, limited to the issue of whether the imposition of a death sentence under the law of Georgia for the crime of rape violates the Eighth or Fourteenth Amendments of the United States Constitution. _____ U.S. _____ (1976).

SUMMARY OF ARGUMENT

I.

Extreme cases of rape call for extreme sanctions. If the punishment of death is a constitutionally permissible penalty for murder, it should equally be permissible for rape in certain circumstances. The same interests—retribution, deterrence, and incapacitation—that a legislature may rationally conclude justify the death penalty for murder are just as forceful in some rape cases. Some rapes involve such depraved sexual abuse and the infliction of such serious physical injury that death is not a disproportionate, much less grossly disproportionate, punishment. For those who have demonstrated a propensity to commit crimes of this magnitude and who again rape, death is not a disproportionate punishment. The punishment of death for rape is not always an excessive penalty.

II.

"Evolving standards of decency" tolerate the punishment of death for rape in extreme cases. If measured by past history, contemporary standards tolerate the punishment—rape was punished with death under the common law and many jurisdictions, through the middle of this century, sanctioned the death penalty for rape. Although few jurisdictions presently sanction the death penalty for rape, the result does not necessarily follow that they do not because the penalty is inconsistent with contemporary values. Of the sixteen states that sanctioned the death penalty for rape prior to *Furman v. Georgia*, eleven thereafter enacted capital punishment laws that are probably deficient when tested by *Woodson v. North Carolina*. As rape is generally viewed as less serious than murder, for the states that did not re-enact capital rape statutes, the deletion is no doubt attributable to *Furman* and not to a perception that contemporary values had changed. If measured by jury reaction, contemporary standards tolerate the death penalty for rape—while the number of death verdicts for rape is small, that in five states 30 rapists have been sentenced to death since *Furman v. Georgia* is consistent with the view that the penalty is appropriate in extreme cases.

ARGUMENT

I. Eighth Amendment Challenges: Some General Observations

We need not belabor the point of the presumptive constitutional validity of the statutes presently before the Court.[14] A few observations, however, are in order.

[14] *See, e.g., Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2926 (1976) (plurality opinion).

As in prior cases, the issue before the Court is not the wisdom of capital punishment, but rather the constitutionality of the punishment for a particular class of crime. *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting). While the Cruel and Unusual Punishments Clause is a check on the exercise of state legislative power, *Robinson v. California*, 370 U.S. 660 (1962), as long as a punishment "is not cruelly inhumane or disproportionate to the crime involved," the Clause does not dictate that a less severe punishment must be utilized to the exclusion of a more severe one. *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2926 (1976) (plurality opinion).

The power to punish must also be "exercised within the limits of civilized standards," *Woodson v. North Carolina*, ____ U.S. ____, 96 S. Ct. 2978, 2990 (1976) (plurality opinion), *quoting Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). One objective measure of contemporary civilized standards is the expression of the legislative judgment.

The most recent expression of legislative judgment pertaining to capital punishment occurred subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972). It is apparent from the post-*Furman* statutory enactments that contemporary society does not reject capital punishment per se. Because of the variations in the statutory responses,[15] however, it becomes more difficult to glean further insight from them in assessing contemporary standards. Apart from their acceptance of capital punishment, the enactments otherwise are probably best viewed as responding to the intricacies of *Furman*

[15] *See*, Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. R. 1690 (1974).

and not to any change in societal values. *Cf. Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2988-2989 (1976) (plurality opinion). Thus, beyond a general acceptance of capital punishment, the reliability of the post-*Furman* enactments as a measure of contemporary values is somewhat diminished.

With these observations in mind, we now consider whether the punishment of death for rape is always an unconstitutionally excessive punishment. We will then address the issue of whether the punishment of death for rape is consistent with evolving standards of decency.

II. Death For Rape: Is It Always Unconstitutionally Severe And Disproportionate?

As an abstract issue, the penalty of death for murder does not run afoul of the Eighth and Fourteenth Amendments; yet, if the procedural mechanisms utilized by a state in imposing a death sentence for murder fall outside "contemporary" or "civilized" standards, the punishment yields to these amendments. *Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2922-2932, 2949-2950 (1976); *Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2983-2990 (1976) (plurality opinion). The initial abstract question must also be answered here: Is the penalty of death for rape contrary to the Eighth and Fourteenth Amendments in all circumstances? [16]

[16] Although he responds affirmatively, the petitioner never really addresses the abstract issue; the structure of his brief discloses an apparent belief that he must only show that "evolving standards of decency" eschew death as a penalty for rape. *But see Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2993 (Rehnquist, J., dissenting).

Whether, in the abstract, death is an impermissibly excessive penalty for rape requires a dual inquiry. Does the penalty exact a needless and inhumane suffering? *Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2925 (1976) (plurality opinion), *citing Furman v. Georgia*, 408 U.S. 238, 392-393 (1972) (Burger, C. J., dissenting). Is the penalty grossly disproportionate to the severity of the crime? *Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2925 (1976) (plurality opinion), *citing Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (dictum), and *Weems v. United States*, 217 U.S. 349, 367 (1910).

The inhumaneness *vel non* of a particular punishment is probably best analyzed in terms of whether the punishment can be said to rationally serve the interest of the state in controlling crime. Disproportionality is a more elusive, somewhat intuitive,[17] concept. Each concept is considered *seriatim* below.

A. Inhumaneness as an Absence of Justification

The social purposes served by capital punishment have been thoroughly discussed in prior cases. Thus, it is unnecessary to more than briefly canvass the interests which a state seeks to promote when punishing violators of its most serious penal laws. The interests already explored range from retribution[18] and deter-

[17] *See Furman v. Georgia*, 408 U.S. 238, 280 n. 24 (1972) (Brennan, J., concurring).

[18] *E.g., Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2930 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 394-395 (Burger, C. J., dissenting).

rence[19] to the encouragement of guilty pleas and simply economy.[20]

Suffice it to say that here, as in previous cases, Georgia relies upon retribution and general deterrence as a justification for imposing the punishment of death on some rapists. But Georgia also relies heavily upon specific deterrence, or incapacitation,[21] as a justification.

Retribution. We initially observe that while "[r]etribution . . . [may] no longer [be] the dominant objective of the criminal law," *Williams v. New York*, 337 U.S. 241, 248 (1949), it remains a "principal" objective.[22]

The principle of *lex talionis* is perhaps the cornerstone of one of the basic arguments that death should be imposed, if at all, only when the offender has taken a life. *Cf. Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari; second rhetorical question). But the Eighth Amendment did not enact the ancient biblical command and as Professor Packer notes, the command "is not an ideal that is likely to appeal strongly to judges [or anyone] who entertain[s] views generally applauded as enlightened and progressive."[23]

[19] *E.g., Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2930-2931 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 345-354 (Marshall, J., concurring), 454-455 (Powell, J., dissenting).

[20] *Furman v. Georgia*, 408 U.S. 238, 355-357 (Marshall, J., concurring).

[21] *See Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2930 n. 28 (plurality opinion); *Roberts v. Louisiana*, ____ U.S. ____, 96 S. Ct. 3001, 3016 (White, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 355 (Marshall, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 111 (Brennan, J., concurring).

[22] *See* Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 Am. Crim. L. Rev. 615, 628 (1976).

[23] Packer, *Making the Funishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1078-1079 (1964).

While the concept of retribution might at first blush appear to be a more valid justification for the supreme penalty when a murderer takes a life, the fact nevertheless remains that some rapes are committed in such a horrid manner as to evoke the rightful indignation of the public.[24] Moreover, it does not take much imagination to envision extreme cases of rape that call for a greater degree of public condemnation than for many, if not most, murders.[25] Simply put, the public expression of indignation through sentencing provides a rational alternative to "self-help, vigilante justice, and lynch law," *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring), and is as applicable to rape as murder. *Id.* at 459 (Powell, J., dissenting).

General deterrence. While the debate over the effectiveness of capital punishment as a deterrent to the commission of capital crimes continues,[26] it now seems settled that the question must be answered legislatively and not judicially. *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2931 (1976) (plurality opinion); *Roberts v. Louisiana*, ____ U.S. ____, 96 S. Ct. 3001, 3017 (1976) (White, J., dissenting). Certainly, less is known about

[24] Some rapes that, in comparative terms, are not particularly abusive and degrading may similarly trigger public indignation if the character of the offender is also considered – for example, those committed by the incorrigible recidivist. Recidivism will be developed more fully when we address specific deterrence. *See* pp. 12-14 *infra*.

[25] In recent years over two-thirds of all murders have not involved other felonious activities. FBI, CRIME IN THE UNITED STATES 1975, at 18-19 (1976).

[26] *See, e.g.*, Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L. J. 187 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 Yale L. J. 359 (1976).

the efficacy of the death penalty as a deterrent to rape than about the death penalty deterring murder; deterrence studies almost always focus on homicide. But if less is known about deterrence vis-a-vis rape, the more important it becomes to resolve the issue in the legislative forum.

Georgia, of course, has no interest in executing all rapists. We do have an interest, however, in reducing the incidence of rape wherein the victim suffers serious physical and emotional injury; we do have an interest in reducing recidivism among rapists. Our legislature has not acted "blindly and arbitrarily" (Petitioner's Brief, at 36) in providing that some rapists may be punished with death; our legislature was free to rationally conclude that the fear of death may deter, if not all would-be rapists to some extent, at least those rapists inclined to commit especially sordid and abusive deeds [27] and those predisposed to repetitive acts of violence.[28]

Specific deterrence or incapacitation. Recidivism among offenders continues to be a grave problem.[29] The problem is especially serious if the offender is prone to violence. Professor Packer asks, "What are we to do with those whom we cannot reform and, in particular,

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[27] *See* Ga. Code Ann. §27-2534.1(b)(7) (Supp. 1976) (aggravating circumstances):

> "The offense of . . . rape . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

[28] *See* Ga. Code Ann. §27-2534.1(b)(1) (Supp. 1976) (aggravating circumstances):

> "The offense of . . . rape . . . was committed by a person with a prior record of conviction for a capital felony. . . ."

[29] *See, e.g.*, Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 Am. Crim. L. Rev. 615, 627-628 (1976).

those who by our failure are thought to remain menaces to life?" Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1081 (1964).

Georgia recognizes that for certain violence-prone recidivists, undeterred by the fear of death, incapacitation is an answer, perhaps the best answer. *See* Ga. Code Ann. §27-2534.1(b)(1) (Supp. 1976).[30] Other states, as well as the Model Penal Code, similarly recognize that violent recidivism is a legitimate "aggravating" circumstance. *See, e.g.*, Fla. Stat. Ann. §921.141(5)(b) (1974 Rev.); Model Penal Code §210.6(3)(b) (Proposed Official Draft, 1962). In at least one state, it must be shown that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before a sentence of death can be imposed. Texas Code Crim. Proc., Art. 37.071(b)(2) (Supp. 1975-1976).

In terms of the incorrigible recidivist who has a demonstrated proclivity for violence, such as rape, the concept of total incapacitation (*i.e.*, execution) should not constitutionally turn upon whether the defendant took a life in the most recent act of rape for which he stands convicted. Stated in another fashion, must society wait until the defendant perhaps murders his next victim before they are constitutionally permitted to save the life of that victim and others by totally incapacitating the defendant?[31] The irrelevancy of

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[30] *See* note 28, *supra*.

[31] As noted by Mr. Justice White in *Roberts v. Louisiana*, _____ U.S. _____, 96 S. Ct. 3001 (1976), "death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not." *Id.* at 96 S. Ct. 3016 (White, J., dissenting).

whether the defendant has taken a life in his most recent offense is reinforced by the widely accepted view that "the strongest case for severe measures of incapacitation are not murderers as a group (their offenses are often situational) but rather those who have repeatedly engaged in violent combative behavior." [32]

To conclude, some rapists have demonstrated not only that they will likely continue to be rapists but also that they will likely continue to kill or seriously injure those whom they rape. When these rapists are identified, it should be constitutionally permissible to execute them.

Conclusion. The Georgia legislature has determined that, in some cases of rape, death should be an available sanction. The concepts of retribution, deterrence, and incapacitation justify the imposition of death as a sanction for rape in extreme cases for most of the same reasons that justify the imposition of death as a punishment for murder in some cases. While each concept, or justification, has been examined independently, it hardly needs to be observed that the justifications, while standing alone, are certainly not mutually exclusive.

Based as it is on concepts of retribution, deterrence, and incapacitation, the legislative determination that some rapists should be punished with death can hardly be said to be irrational or without justification. As the punishment of death for rape is not without some justification, the punishment is not "unnecessarily cruel." *Cf. Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2929-2931 (1976) (plurality opinion).

[32] Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1080 (1964).

We now turn to disproportionality.

B. Disproportionality

"[R]ape . . . is indisputably a grave crime, deserving stringent punishment."

—Petitioner's Brief, at 35.

As noted earlier, disproportionality as a measure of "excessiveness" is an elusive concept. *See* page 9, note 17, *supra*. In *Furman v. Georgia*, Mr. Justice Brennan commented upon Mr. Justice Fields' apparent "intuitive sense" of disproportionality in *O'Neil v. Vermont*.[33] *Furman v. Georgia*, 408 U.S. 238, 280 n. 24 (Brennan, J., concurring). While concluding that the "disproportionality test may not be used . . . to strike down the death penalty for rape altogether," Mr. Justice Powell suggested that the test was perhaps best utilized on a case by case basis. *Furman v. Georgia*, *supra*, 408 U.S. at 461 (Powell, J., dissenting). More recently, in *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909 (1976), three members of the Court simply held that the punishment of death was not "invariably disproportionate" when the crime is murder and the defendant has wilfully taken a life. 96 S. Ct. at 2932 (plurality opinion).

Historically, rape has been punished as a capital offense in many jurisdictions. When *Furman* was decided, rape was a capital offense in sixteen states. While some courts may have occasionally vacated a death sentence for rape on the basis that the penalty was too excessive under the facts of the particular case before the court, *see Ralph v. Warden*, 438 F. 2d 786 (4th Cir. 1970), *cert. denied* 408 U.S. 942 (1972); *Calhoun*

[33] 144 U.S. 323, 340 (1892). (Fields, J., dissenting).

v. State, 85 Tex. Cr. 496, 503, 214 S.W. 335, 338 (1919), it does not appear that any court has ever decreed that the death penalty for rape, regardless of the circumstances of the crime and the character of the offender, is always unconstitutionally disproportionate.

Upon reflection, the reason for the absence of any unilateral decree is not difficult to fathom—some rapes involve such depraved sexual abuse and the infliction of such serious physical injury that extreme sanctions are necessary. If the perpetrator has a history of similar behavior, extreme sanctions are all the more in order. A rape involving the circumstances described no doubt ranks higher on the public's "scale of seriousness" than many, if not most, murders. *See* page 11, note 25, *supra*.

The petitioner concedes (Petitioner's Brief, at 35), as he must, that the "concept of . . . [disproportionality] does not require that the punishment fit the crime with mathematical precision." Otherwise, in the context of capital punishment, we have established a contemporary form of *lex talionis*. Too, it bears repeating that a punishment for a particular crime fails to measure up to the proportionality standard only if it is *grossly* disproportionate.

The punishment of death for rape, under any and all circumstances, is simply not so disporportionate to the crime as to be unconstitutionally excessive. *Furman v. Georgia*, 408 U.S. 238, 393 n. 18 (1972) (Burger, C. J., dissenting). To be sure, death for rape is an extreme sanction, suitable for those cases that can only be described as extreme.

Before turning to the issue of whether the punishment of death for any rape is consistent with "evolving

standards of decency," brief mention should be made of Georgia's unique statutory disproportionality review.

By providing the death penalty as a permissible punishment for rape, Georgia obviously has concluded that the penalty is not always disproportionate to the crime. But Georgia is not oblivious to the concept of proportionality; our Supreme Court has been mandated, in each case where a sentence of death has been imposed, to determine:

> "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, *considering both the crime and the defendant.*"

Ga. Code Ann. §27-2537 (c) (3) (Supp. 1976) (emphasis added). Thus, death sentences are vacated for "crime[s] technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category." [34]

III. Evolving Standards Of Decency And Rape As A Capital Offense: Is The Evolutionary Process At An End?

The petitioner's position is simply that "evolving standards of decency"—assessed through traditional usage, legislative enactments, and jury determinations—condemn death as a disproportionate punishment for rape. As we will demonstrate, however, the objective indicators of contemporary values upon which the petitioner relies, do not support the conclusion he reaches.

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[34] *Furman v. Georgia*, 408 U.S. 238, 461 (1972) (Powell, J., dissenting). *See Coley v. State*, 231 Ga. 829, 204 S.E. 2d 612 (1974).

A. History and Traditional Usage

The petitioner perceives a trend to abolish death as a punishment for rape based on the fact that few states [35] presently sanction the penalty. For reasons that will become apparent when we discuss legislative enactments, we cannot agree.

Suffice it to say that rape was a capital crime under the common law,[36] that rape was a capital crime in seventeen states in 1919,[37] and that rape was a capital crime in sixteen states when *Furman* was decided. There is simply no "trend" shown; tradition and history sanction death as a punishment for rape.

B. Legislative Enactments

The petitioner makes his strongest and most forceful argument when he asserts that the "minuscule" number of states making rape a capital crime in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), is evidence of the contemporary repudiation of death as a punishment for rape. Petitioner's Brief, at 37. But the petitioner's argument necessarily assumes that the post-*Furman* enactments resulted from a societal rejection of death as a punishment for rape and not from *Furman* itself. For this reason, the argument is flawed.

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[35] Apparently six: Fla. Stat. Ann. §794.011 (1976 Rev.); Georgia; La. Rev. Stat. Ann. §14:42 (1974); Miss. Code Ann. §97-3-65 (1974); N.C. Gen. Stat. §14-21 (Cum. Supp. 1975); Tenn. Code Ann. §39-3702 (1975). As the petitioner notes, in Florida, Mississippi, and Tennessee the crime is made capital only if the victim is of tender years, and *Woodson v. North Carolina*, _____ U.S. _____, 96 S. Ct. 2978 (1976), has no doubt rendered all but the Florida and Georgia statutes unconstitutional.

[36] *See* H. BEDAU, THE DEATH PENALTY IN AMERICA, 1-2 (rev. ed. 1967).

[37] BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 11-12 (1919).

The legislative reaction to *Furman* can perhaps best be described as being as diverse as the concurring opinions that made the majority. *See*, Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. R. 1690 (1974). Of the sixteen states that punished rape as a capital crime prior to *Furman*, eleven later enacted general capital punishment statutes that are at least arguably suspect in light of *Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978 (1976).[38]

Rape, *as a class* of crime, is no doubt generally viewed as less serious than murder.[39] Thus, it is not surprising that those states opting for so-called mandatory statutes eliminated rape as a capital crime entirely or else retained rape as a capital crime in only narrow circumstances. About all that can be said about the legislatures that enacted these statutes is that they apparently read *Furman* as requiring mandatory sentencing; given a choice between executing all rapists and executing none, or almost none, the legislatures opted for executing none. The choice says little in terms of society suddenly rejecting the death penalty for rape. *Cf. Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2988-2989 (1976) (plurality opinion). For similar reasons, those legislatures enacting discretionary statutes, but eliminating rape as a capital crime, likely perceived

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[38] Ky. Rev. Stat. §507.020 (1975); La. Rev. Stat. Ann. §14:30 (1974); Md. Code Ann., Art. 27 §413 (Supp. 1976); Miss. Code Ann. §§97-3-19, 97-3-21, 97-25-55, 99-17-20 (Cum. Supp. 1975); Vernon's Mo. Stat. Ann. §§559.005, 559.009 (Supp. 1976); Nev. Rev. Stat. §200.030 (1975 Rev.); N.C. Gen. Stat. §§14-17, 14-21 (Cum. Supp. 1975); 21 Okla. Stat. Ann. §§701.1-701.3 (Supp. 1975); S.C. Code Ann. §16-52 (Supp. 1975); Tenn. Code Ann. §§39-2402, 39-2406, 39-3702 (1975); Va. Code Ann. §§18.2-10, 18.2-31 (1975 Rev.).

[39] Specific instances of rape, however, are often *more* serious than many murders. *See* page 11, *supra*.

that *Furman* required a narrowing of the overall process whereby some offenders are sentenced to death and others, convicted of similarly defined crimes, are not. That some states may have narrowed the definitions of crimes more than was constitutionally necessary, and eliminated some crimes entirely, tells us little about societal rejection of death as a punishment for rape.

The varied legislative responses to *Furman* are hardly an accurate assessment of contemporary standards *as they pertain to rape*. An examination of the legislative enactments existing at the time of the *Furman* decision would no doubt provide a more reliable assessment; after all, the standard had remained relatively constant for fifty years.

In terms of his reliance on statutes that *presently* sanction the death penalty for rape, the petitioner has overstated his contemporary standards argument. The legislative response to *Furman* is simply no basis upon which to conclude that contemporary society rejects death as a punishment for all rapes.

C. Jury Determinations

The petitioner perceives the fact that only three defendants are now under a sentence of death in Georgia as a "clear indication that death as a punishment for rape has been publicly repudiated by [our citizens]." [40] Petitioner's Brief, at 44.

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[40] Two other rape defendants were sentenced to death by juries under the procedures enacted by Ga. Code Ann. §27-2534.1 (Supp. 1976). In one case the sentence was vacated as disproportionate. *Coley v. State*, 231 Ga. 829, 204 S.E. 2d 612 (1974). In the other, the sentence was vacated on *ex post facto* grounds. *Akins v. State*, 231 Ga. 411, 202 S.E. 2d 62 (1973).

The petitioner also notes that, subsequent to *Furman* and prior to *Gregg*, fourteen defendants were sentenced to death for rape in Louisiana and eight defendants in North Carolina were sentenced to death. Petitioner's Brief, at 44. The petitioner further informs us that two persons have been condemned to die under Florida's sexual battery law and that one defendant was sentenced to death in Mississippi. *Id.* at 42 n. 40.

That thirty rapists have been sentenced to death since *Furman* suggests the opposite conclusion from that reached by the petitioner. Far from the "public repudiation" perceived by the petitioner, the jury, as the collective conscience of the community, views the death penalty as a necessary punishment.

When the number of death verdicts in rape cases are compared with the number of lesser verdicts, the latter obviously constitute a larger percentage. In this context, death verdicts may be said to be infrequent. But the relative infrequency of death verdicts in rape cases does not mean that the punishment is now condemned by contemporary society in *all* cases.

First, just as in murder cases, jury reluctance is no doubt attributable to a "humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2929 (1976) (plurality opinion). Secondly, rape is generally perceived to be, although a serious offense, less serious than murder. Thus, it can be expected that far fewer specific instances of rape will be viewed by juries as so serious as to require a death verdict. It is the extreme cases for which death is warranted and imposed. The evidence upon which the petitioner relies does not show otherwise.

Brief mention should be made of the petitioner's effort to minimize the extremity of his own offense by comparing his case with others that are, in his words, "far more aggravated." Petitioner's Brief, at 45. The petitioner lists five cases: *Welch v. State*, 237 Ga. 665, 229 S.E. 2d 390 (1976); *Woodard v. State*, 234 Ga. 901, 218 S.E. 2d 629 (1975); *Zilinmon v. State*, 234 Ga. 535, 216 S.E. 2d 830 (1975); *Crowder v. State*, 233 Ga. 789, 213 S.E. 2d 620 (1975); and *Hammock v. State*, 233 Ga. 733, 213 S.E. 2d 618 (1975).

While the physical harm suffered by the victims in the above cases was no doubt greater than the observable harm suffered by Elnita Carver, the petitioner ignores his demonstrated propensity to commit violent acts of rape.[41] The records in the cases relied upon by the petitioner reflect that the defendants in four of the cases did have prior convictions. But none of the defendants had a prior capital conviction much less a prior rape (or any sex offense) conviction.

The petitioner's effort to demonstrate the similarity of his case to that of Jessie Coley (*Coley v. State*, 231 Ga. 829, 204 S.E. 2d 612 (1974)) fails for essentially the same reasons.

Coley and the petitioner each committed a rape (without much other observable harm to the victim) [42] after escaping from prison and each had a prior conviction for a capital felony. While the prior capital conviction

[41] The promptness with which he was apprehended after fleeing with Ms. Carver perhaps saved her from a fate similar to that of Susan Jones (A. 306, 310) or, worse, Sue Ann Wick. (A. 308).

[42] The "torture" present in *Coley*, alluded to by the petitioner at page 45 of his brief, involved locking the victim in the trunk of an automobile. *Coley v. State*, *supra*, 231 Ga. at 839, 204 S.E. 2d at 619.

is a point of similarity, at the same time, it also distinguishes the two defendants. Coley had previously committed an armed robbery (for which he was sentenced to nineteen years imprisonment); the petitioner, of course, had previously raped two other victims and had murdered one.

These two cases demonstrate why an aggravating circumstance, such as a prior capital conviction,[43] is simply a prerequisite to the imposition of the death penalty, not a death knell in itself. The cases also reflect the wisdom of proportionality review. *See* Ga. Code Ann. §27-2537(c)(3) (Supp. 1976).

The jury, as a reflector of contemporary values, does not reject capital punishment for rape in all cases. The available evidence suggests that the punishment will continue to be imposed in extreme cases.

D. Summary

Tradition and history support the retention of the death penalty for rape. While few states made rape a capital offense subsequent to *Furman v. Georgia*, the legislative enactments were in large measure responsive to *Furman* rather than society's sudden rejection of the death penalty for rape. With the caveat that the enactments demonstrate an acceptance of capital punishment as a general proposition, they offer little assistance in determining whether the death penalty for rape is otherwise rejected. Jury reaction, however, demonstrates that the death penalty for rape is consistent with contemporary standards in extreme cases.

[43] Ga. Code Ann. §27-2534.1(b)(1) (Supp. 1976); *see* n. 28, *supra*.

It may be that at some future date the question posed at the beginning of this section will be answered affirmatively. But that day is not yet here. Today, based on two objective indicators of contemporary values, the question must be answered: "No." For extreme cases death is a necessary and appropriate response.

CONCLUSION

Based on the character and record of the petitioner, his sentence of death for rape is not a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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IN THE

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October Term, 1976

No. 75-5444

EHRLICH ANTHONY COKER,

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-v.-

STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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REPLY BRIEF OF PETITIONER

The sole purpose of this Reply Brief is to update three factual representations contained in the Brief for Petitioner:

(1) Pages 38-42 note that six States had enacted statutes in the wake of Furman v. Georgia, 408 U.S. 238 (1972), authorizing capital punishment for any rape-like offense, and that two of these statutes (North Carolina's and Louisiana's) had been effectively invalidated by this Court's decisions in Woodson v. North Carolina, 49 L.Ed.2d 944 (1976), and Roberts v. Louisiana, 49 L.Ed.2d 974 (1976). The Tennessee statute has since been invalidated under Woodson and Roberts, see Collins v. State, Tenn. Sup. Ct., No. 63 (Hamblen Crim.)(Jan. 24, 1977), with the result that only three American jurisdictions now provide the death penalty for any sex offense not resulting in the death of the victim: Georgia, for rape; and Mississippi and Florida, for certain rapes of young children. Not one of the new capital punishment statutes enacted since July 2, 1976, has authorized the death penalty for any kind of rape. 1/

1/ 1976 Okla. Sess. Laws, c. 1, p. 627 (First Extraord. Sess.)(July 23, 1976); La. Acts 1976, No. 316 (Aug. 1, 1976), La. Acts 1976 No. 694 (Aug. 2, 1976); 1976 Ky. Acts, c. 15 (Extraord. Sess.) (Dec. 22, 1976); 1977 Wyo. Sess. Laws, c. 122 (Feb. 28, 1977). In three other States, death penalty legislation has passed both Houses of the Legislature and awaits gubernatorial action; in none of these bills has the death penalty been authorized for any kind of sex offense not resulting in the death of the victim: N.J. S.B. 639 (passed Senate, Jan. 11, 1977; passed Assembly, Jan. 31, 1977)(1977 Sess.); Va. H.B. 1329 (passed House of Delegates, Feb. 10, 1977; passed Senate, Mar. 3, 1977)(1977 Assembly Sess.); Md. S.B. 106 (passed Senate, Feb. 25, 1977), Md. H.B. 785 (favorable report, House of Delegates, Mar. 11, 1977) (1977 Sess.).

(2) Page 43 and n.41 state that there are presently five persons in the United States on death row for rape-like offenses. The Supreme Court of Florida has since set aside the sentences of two persons condemned in that State for sexual battery of a child. See Purdy v. State, Fla. Sup. Ct. No. 47074 (Feb. 3, 1977); Huckaby v. State, Fla. Sup. Ct. No. 47736 (Feb. 17, 1977). Three other death sentences for rape-like offenses have come to our attention: State of Georgia v. Donald Boyer, Chatham County (Ga.) Super. Ct. No. 23816 (death sentence for rape imposed Dec. 18, 1975); State of Georgia v. Willie James Hughes, Burke County (Ga.) Super.Ct. No. 1330 (death sentence for rape imposed Dec. 1, 1976); State of Florida v. William Horace Shue, Jr., Circuit Ct. for the Fifth Jud. Dist. in and for Marion County (Fla.) No. 75-508 (death sentence for sexual battery imposed Feb. 7, 1977; jury's advisory verdict had recommended life imprisonment). Petitioner therefore now appears to be one of six persons in this country now under sentence of death for such an offense.[2/]

2/ This group consists of petitioner, Messrs. Boyer, Hughes, and Shue, supra; John Wallace Eberheart, No. 74-5174 (pending in this Court on petition for certiorari); and John Wesley Hooks, No. 74-5954 (pending in this Court on petition for certiorari). See Brief for Petitioner at 43 n.41, Brief for Respondent at 20.

(3) Appendix B, at 1b-3b, states that forty-two reported rape cases arising under the 1973 capital punishment statute have been reviewed by the Georgia Supreme Court. Since the filing of the Brief for Petitioner, twenty-one more such cases have been reported, none involving the imposition of the death penalty.[3/]

3/ Long v. State, 237 Ga. 110, 227 S.E.2d 22 (1976); Marks, Head, Wright & Kemp v. State, 237 Ga. 277, 227 S.E.2d 334 (1976); Hinton & Newman v. State, 237 Ga. 376, 228 S.E.2d 790 (1976); Williams v. State, 237 Ga. 399, 228 S.E.2d 806 (1976); Williams v. State, 237 Ga. 425, 228 S.E.2d 822 (1976); Young v. State, 237 Ga. 470, 228 S.E.2d 856 (1976); Harris v. State, 237 Ga. 522, 228 S.E.2d 897 (1976)(an unnamed codefendant was also convicted but did not appeal); Wilson v. State, 237 Ga. 657, 229 S.E.2d 424 (1976); Thomas v. State, 237 Ga. 690, 229 S.E.2d 458 (1976); Byrd v. State, 237 Ga. 781, 229 S.E.2d 631 (1976); Miller v. State, 237 Ga. 823, 229 S.E.2d 648 (1976); Dorris v. State, 237 Ga. 837, 229 S.E.2d 638 (1976); Glover v. State, __Ga.__, 230 S.E.2d 293 (1976); Bailey v. State, __Ga.__, 230 S.E.2d 311 (1976); Scott & Light v. State, __Ga.__, 230 S.E.2d 857 (1976); Tiller v. State, __Ga.__, 230 S.E.2d 874 (1976). Welch, Swain & Harris v. State (see Brief for Petitioner at 45, 2b n.4b) has been reported and appears at 237 Ga. 665, 229 S.E.2d 390 (1976).

Imposition of the death penalty for rape is unconstitutionally excessive and therefore violates the Eighth Amendment.

Respectfully submitted,

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STATE OF GEORGIA,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND, THE WOMEN'S LAW PROJECT, THE CENTER FOR WOMEN POLICY STUDIES, THE WOMEN'S LEGAL DEFENSE FUND, and EQUAL RIGHTS ADVOCATES, INC.

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BRIEF AMICI CURIAE

Interest of Amici *

The American Civil Liberties Union is a nationwide, nonpartisan organization

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* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women is a pervasive problem at all levels of society, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination.

The Center for Constitutional Rights is a non-profit tax-exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Southern Civil Rights movement, the Center has, since 1969, devoted substantial energy to the struggle of women to effectuate their constitutional right to the equal protection of the laws, and has focused attention on unequal treatment in the area of rape. The Center has become involved in rape victim representation and in efforts to eliminate the special evidentiary requirements and excessive penalties which impede the operation of rape laws.

Organized in 1966, the National Organization for Women (NOW) is a national membership organization of over 40,000 women and men in 700 chapters working to bring women into full and equal political, social and economic

rights for women. The NOW Legal Defense and Education Fund is the litigating and educational arm of the National Organization for Women.

The Women's Law Project is a non-profit feminist law office located in Philadelphia, Pennsylvania and dedicated to working for the legal equality of women through litigation, public education, research and the representation of local women's groups. The Project has represented,among other groups, Women Organized Against Rape, a Philadelphia group working for change in the legal process regarding rape.

The Center for Women Policy Studies (CWPS) is a non-profit, tax exempt corporation founded in 1972 and located in Washington, D.C. Its purpose is to improve the economic and legal status of women. In 1976, pursuant to a grant from the Law Enforcement Assistance Administration (LEAA), the Center published guidelines to improve the response of criminal justice agencies, hospitals, and community groups to victims of rape. Under another LEAA grant, CWPS renders technical assistance to selected victim assistance projects, publishes a newsletter and runs a clearinghouse for persons concerned with the welfare of victims of rape.

The Women's Legal Defense Fund is a non-profit, tax-exempt corporation located in Washington, D.C. organized in 1971 to secure equal rights for women by providing volunteer legal representation as well as sponsoring informational and educational activities on legal issues of special interest to women. The Fund, through the volunteer activities of its 200 members, has served on the Washington, D.C. Task Force on Rape which recommended reducing the severe statutory penalties for rape and has represented a number of rape victims, working with the D.C. Rape Crisis Center.

Equal Rights Advocates, Inc. (E.R.A., Inc.) is a non-profit, tax-exempt legal and educational corporation located in San Francisco, the primary aim of which is to promote equal rights of men and women under law. A substantial measure of the time, energy and resources of E.R.A., Inc. is spent in litigation and legal education designed to further constitutional and statutory principles of non-discrimination on account of sex.

As legal organizations devoted to equal rights for women, amici submit this brief to demonstrate that the death penalty for rape is a reflection of archaic views of women, and that the excessive severity of the penalty leads to a refusal by juries to convict guilty defendants as well as to evidentiary rules which hamper prosecution. It is

further contended that jury unwillingness to impose such a severe penalty indicates that the death penalty does not meet the standards of the Eighth Amendment.

Opinion Below

The opinion of the Supreme Court of Georgia is reported at 234 Ga. 555, 216 S.E.2d 782(1975) and is set out in the Petition for Writ of Certiorari at Appendix A.

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Petitioners.

Summary of Argument

The historical origin of the death penalty for rape lies in the long standing view of rape as a crime of property where the aggrieved was not the woman but her husband or father. In the Southern states this view coalesced with a tradition which valued white women according to their purity and chastity and assigned them exclusively to white men.

As a result, a double standard of justice developed for weighing and punishing rape by white and black men. This double standard of justice was reflected in Georgia's penalty structure for rape which, until the abolition of slavery, reserved the death penalty exclusively for black men. Even since 1861, the death sentence has rarely been imposed on white men.

The history of rape as a crime against man's property, not against the woman herself, sheds light on the ambivalent treatment of the victim who is viewed not simply as the virgin whose violation inspires outrage but also as the temptress who threatens every man with conviction. This latter perception, as well as the severe penalties attached to a rape conviction, has led to special rules requiring corroboration of the victim's testimony, permitting evidence of the woman's prior sexual conduct or reputation for chastity and authorizing

cautionary jury instructions which impugn the victim's credibility.

The death penalty for rape does not meet "contemporary standards regarding the infliction of punishment," Woodson v. North Carolina, 96 S. Ct. 2978 (1976), and hence runs afoul of the Eighth Amendment. Jury repudiation of the penalty is apparent. Moreover, overly severe penalties for rape, epitomized by the death penalty, are counterproductive to the goal of affording maximum legal protection to victims of rape since they have led to a conviction rate for rape which is lower than that for any other major violent crime.

Amici, interested in effective enforcement of laws against rape, urge that the death penalty for rape be invalidated because it stems from archaic notions which demean women and gross racial injustice and does not serve the goal of convicting and subjecting to criminal sanctions those who are in fact guilty of rape.

ARGUMENT

Introduction

The women's movement has recently focused increased attention on the crime of rape, because of a concern that the legal system does not adequately protect women victims of rape. Courts and commentators have noted the unique treatment of rape within the criminal law: a confluence of several factors -- special evidentiary requirements, an extreme penalty structure, and prejudiced attitides of police, prosecutors, juries and judges toward women complainants -- has led to a lower conviction rate for rape than for any other violent crime. See People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975); Brownmiller, Against Our Will: Men, Women, and Rape (1975); Law Enforcement Assistance Administration, Rape and Its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies (1974); Medea and Thompson, Against Rape (1974); Note, "The Victim in a Forcible Rape Case: A Feminist View," 11 Am. Crim. L. Rev. 335 (1973); Note, "Rape and Rape Laws: Sexism in Society and Law," 61 Calif. L. Rev. 919 (1973); Note, "The Rape Victim: A Victim of Society and the Law," 11 Willamette L.J. 36 (1974). The death penalty as a potential sanction for rape is part of the fabric of laws and enforcement patterns based on obsolete and demeaning notions about women which

inevitably yields lack of enforcement of rape laws, rather than protection of women.

Amici submit the instant brief on behalf of a large segment of the women's legal community who oppose the death penalty for rape as a vestige of an ancient, patriarchal view of women as the property of men, as a reflection of societal ambivalence toward the woman victim, and as a barrier to proper and vigorous enforcement of rape laws. Review of the history and impact of the death penalty for rape demonstrates that it is premised on chivalric concepts of property and protection, which as this Court has noted, "put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). Moreover, in this country, the death penalty for rape has operated in a singularly uneven fashion: it has been applied overwhelmingly to condemn black men for "violating" Southern white women. Wolfgang and Reidel, "Race, Judicial Discretion, and the Death Penalty", Annals, Amer. Acad. of Polit. & Soc. Sc., Vol. 407, 119, 126-33 (1973).

In arguing that the death penalty for rape is intolerable in our society, amici continue the efforts of an earlier generation of women who firmly rejected the notion that destruction of men's lives served to protect and honor women. In the nineteen-thirties, more than

forty thousand women signed a petition declaring that ...

> ... lynching is an indefensible crime. We believe that ... public opinion has accepted too easily the claim of lynchers and mobsters that they were acting solely in the defense of womanhood. In the light of facts, women can no longer permit the claim to pass unchallenged nor allow themselves to be the cloak behind which those bent upon personal revenge and savagery commit acts of violence and lawlessness in the name of women. We repudiate this disgraceful claim for all time.

Association of Southern Women for the Prevention of Lynching, A New Public Opinion on Lynching, Bulletin No. 5 (1935).

On reasoned analysis, the death penalty for rape cannot withstand measurement against the Eighth Amendment's proscription of punishments which contravene "contemporary standards regarding the infliction of punishment", Woodson v. North Carolina, 96 S. Ct. 2978, 2983 (1976). Its rejection will eliminate a deplorable remnant of the historical stigmatization of women as a subordinate class, and will increase the chance that the law will genuinely serve the interests of the victims of this crime.

I.

The death penalty for rape should be rejected as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to a crippling "chivalric protection." It is part of the fabric of laws and enforcement practices surrounding rape which in fact hamper prosecution and convictions for that crime, thus leaving women with little real protection against rape.

A.

Historical Origins of the Death Penalty For Rape.

Historically rape was seen as a crime of property. The person aggrieved by rape was not the woman herself, but rather her father or husband because his property had been violated. For example, under Mosaic law the rapist of a virgin was penalized by forcing him to pay the bride price to the father and to marry the woman. Deuteronomy 22:13-29. Presumably, this reflected the social reality that the father could not collect a bride price for his "sullied property" elsewhere, and was thus given the money he had lost; the rapist in turn collected the woman as "bride" because he had in

fact paid the requisite sum. Similarly, under ancient Babylonian law, criminal rape was "the theft of virginity, an embezzlement of (the woman's) fair price on the market," Brownmiller, supra, at 9.

These ancient concepts continued into Western law. At common law, the woman victim could save her attacker from the death sentence or blinding and castration by accepting him as her husband*; marriage might be said to be repayment for the destruction of her marriage value by rape, that is, the ruination of property. Note,"Rape and Battery Between Husband and Wife," 6 Stan. L. Rev. 719, 724 & n. 26

---

* Chitty reports that:

> According to [Lord Coke,] ... [rape] was anciently punished with death .... The penalty was mitigated, or rather altered into a deprivation of sight as well as of the offending members by William the Conqueror.... It seems, however, that the female on whom the injury was committed had it in her power to save her ravisher from this terrible sentence by accepting him as her husband.

3 Chitty, Practical Treatise on the Criminal Law 813 (1819). Accord, 1 Hale, Pleas of the Crown 627 (1778).

(1954).* A raped woman could not sue her rapist because "no one except those entitled to the services of the female could maintain an action." 35 Cyc. 1295 (1910). And in the eyes of the law, a married woman could not be raped by her husband since she was already his property, 1 Hale, Pleas of the Crown 629 (1778), just as in American law a slave woman could not be raped by her master. Brownmiller, supra, at 176. J.H. Franklin, From Slavery to Freedom 188 (1969); S. Elkins, Slavery 59 (1973). Even in the mid-1950's, the law immunized a husband from rape charges by his wife in fourteen American jurisdictions. Note, supra, 6 Stan. L. Rev. at 722 n.11.**

---

* This concept of the penalty was translated into American law. In Massachusetts, for example, the penalty for rape of a virgin was the payment of damages and an injunction to marry the victim. Haskins, Law and Authority in Early Massachusetts 142-152 (1960).

** For example, in New York, for the purpose of the criminal law defining sex offenses, a female is defined as "any female person who is not married to the actor." N.Y. Penal Code §130.00 (McKinney's 1975).

In the South, this property tradition was particularly pernicious. White women were recognized as the possessions of white men, I. Baxter, Marital Property §1.1, (1973). L. Bullard, The Slave-Women of America 1870, as cited in P. Rooke Women's Rights, 97 (1972), but were valued more highly than slaves - persons owned explicitly under the law as chattel. S. Elkins, Slavery, 50 (1973); P. Foner, History of Black Americans, 257 (1975). The value of a slave lay in his/her capacity to toil and to reproduce, Elkins, supra, at 55, but the worth of a white woman was determined by her chastity, purity and exclusivity. W.H. Collins, The Truth about Lynching and the Negro in the South, 56-57 (1918); S. Feldman, The Rights of Women 29 (1974). In this view, rape was particularly injurious to a white woman because it undermined her worth, and thus hindered her ability to marry or lowered her value as the exclusive sexual property of her husband. One commentator has forthrightly discussed just these property values:

> ...the woman's power to withhold or grant sexual access is an important bargaining weapon....
>
> The consent standard in our society does more than protect a significant item of social currency for women; it fosters, and is in turn bolstered by, a masculine pride in the

> exclusive possession of a sexual object....An additional reason for the man's condemnation of rape may be found in the threat to his status from a decrease in the "value" of his sexual "possession" which would result from forcible violation.

Comment, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," 62 Yale L.J. 55, 70, 72, 73 (1952).

The legal response to rape in the South dramatically emphasized the value of chastity for white women.* Rape of a virgin, "the citadel of whose character is virtue," meant that "all is gone: her love of justice, sense of character and regard for truth." Camp v. State, 3 Ga. 417, 422 (1847). The raped virgin white woman "was incapable of deeper degradation." Id. Courts stressed "the true value of woman's virtue."

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* In sharp contrast, the law did not even recognize the rape of black women slaves by their masters, since they were already their property. Rape by other white men was only a trespass. Brownmiller, supra at 176. See also, 1 Stewarts Ala. Report 320 (1828); J.H. Franklin, From Slavery to Freedom 188 (1969); S. Elkins, Slavery 59 (1973).

Sims v. Balkcom, 220 Ga. 7, 11, 136 S.E. 2d 766, 769 (1964), because of her role as "the mother of the human race, the bedrock of civilization." Id. at 10. As recently as 1964, the Georgia Supreme Court upheld the death penalty for rape on the basis of "protect[ion] [of] the mothers of mankind" from "the forcible sexual invasion of her body, the temple of her soul, thereby soiling for life her purity, the most precious attribute of all mankind." Id. at 11.

White men alone had sexual access to white women. Rape of white women by black men threatened the white man's status by decreasing the value of his sexual possession, see Comment, supra, 62 Yale L.J. at 73; Brownmiller, supra at 241, and by jeopardizing the "purity" of his race, and it was therefore necessary to take extreme measures to prevent this result. Lynching was one such measure; a double standard of justice for weighing rape by white men and by black men was another; and the death penalty for rape - particularly when perpetrated by blacks - was yet a third.

The Georgia courts early defined a double standard of justice for rape law. In 1851, the Georgia Supreme Court found that rape perpetrated by a black slave on a free white female "...is calculated to excite indignation in every heart...." Stephen, A Slave v. State, 11 Ga. 225, 230 (1851). Thus, that court, mindful of "racial differences and the well-

established customs which emphasize these differences," allowed a jury to infer intent to commit rape when the evidence showed only an assault committed by a negro man upon a white woman. McCullough v. State, 10 G.A. 403, 73 S.E. 546, 547 (1912). In Dorsey v. State, 108 Ga. 477, 480 34 S.E. 135, 136, 137 (1899), the Georgia Supreme Court explained that race might properly be considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female upon failure of which he would abandon his purpose to have sexual intercourse with her." But no Dorsey charge was necessary where both persons were "of color and there was no evidence as to their social standing." Washington v. State, 138 Ga. 370, 75 S.E. 253 (1912).

This separate standard for rape committed by black men was reflected in Georgia's penalty structure. In 1816, the Georgia penal code expressly provided that rape committed by a white man would be punished by a term of imprisonment of not more than twenty years, and attempted rape by not more than five years, but that slaves and "free persons of color" were to be put to death for the crimes of rape or attempted rape on a free white female. Ga. Penal Code of 1816, §§33-34; Ga. Acts of 1816 No. 508 §1, Lamar, Compilation of the Laws of Georgia, 571,804(1821). A facially color blind statute was enacted a year after the abolition of slavery.

However, the original purpose of the Georgia legislature in making rape a capital offense remained significant. The objective was perpetration of a dual standard of justice, one in which only black men convicted of raping white women were sentenced to death.

In practice, that objective persisted long after official statements of it were removed from the law books. A study of the death sentences for rape imposed over a 20-year period in 11 Southern States shows that "among 1,265 cases in which the race of the defendant and the sentence are known, nearly seven times as many blacks were sentenced to death as were whites" and that "black defendants whose victims were white were sentenced to death approximately eighteen times more frequently than defendants in any other racial combination of defendant and victim."* Wolfgang and Riedel, "Race, Judicial Discretion and the Death Penalty", Annals, Amer. Acad. of Polit. & Soc. Sc., Vol. 407, 119, 129-130 (1973).

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* Overall, of the 455 men executed for rape since 1930, 89.5% have been non-white, almost double the percentage (48.9%) of blacks executed for murder during the same period. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 46, Capital Punishment, 1930-1970 12 (August, 1971).

In sum, the death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society, and gross racial injustice created in part out of that patriarchal foundation.

b.

The Effect of the Law's Ambivalence Toward the Rape Victim.

The historical conception of rape as primarily the destruction or devaluation of man's property sheds light on the ambivalent treatment of the victim. She is viewed not simply as the virgin, little Eva, whose violation inspires outrage, Camp v. State, supra, 3 Ga. at 422, but also as the temptress, Eve, by whom "every man is in danger of being prosecuted and convicted." Davis v. State, 48 S.E. 180, 181-2 (Ga.,1904).

These dual and contradictory perceptions have produced a schizophrenic law of rape, characterized on the one hand by unenforceably severe penalties, see Point II, infra, and on the other, by special rules requiring corroboration of the victim's testimony, permitting evidence of the woman's prior sexual conduct or reputation for chastity, and authorizing cautionary jury instructions which impugn the victim's credibility.

These special protections, like the extreme penalties for rape, see Point II, infra, increase the chances that juries will not convict men who are in fact guilty of committing rape. The goal of equitable enforcement of laws against rape would be served far more rationally and realistically by a law neither imposing extreme penalties on, nor granting special protections to, the defendant.

II.

The Death Sentence For Rape Is Impermissible Under The Eighth Amendment Because It Does Not Meet "Contemporary Standards Regarding The Infliction Of Punishment" And Is Inadvisable Since It Diminishes Legal Protection Afforded Rape Victims.

In last Term's death-penalty decision (Woodson v. North Carolina, 96 S.Ct. 2978, 2983-84[1976] the Court delineated the standards for determining whether "the unique and irreversible penalty of death" violates the Eighth Amendment:

> The Eighth Amendment stands to assure that the State's power to punish is "exercised within the

> limits of civilized standards"... Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in Gregg v. Georgia, ante, indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations. (footnotes and citations omitted.)

It is the position of amici that inflicting the death penalty for rape without homicide does not meet the standards set forth by the Court in Woodson. Moreover, women's interest in securing the greatest degree of protection from rape that the legal system can offer consistent with due process would be ill-served by upholding a rape death-penalty statute.

Only three states, Georgia, North Carolina, and Louisiana, currently authorize the death penalty for the rape of an adult female.* However, virtually every state assigns severe penalties to

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* Ga. Code Ann. §27-2534.1 (1975 supp.); N.C. Gen. Stat. §14-21 (1975 cum. supp.); La. Rev. Stat. §14-42 (1974).

a conviction for rape.* Indeed, in many states the penalty structure for rape is more severe than for any other serious but non-homicidal crime. For example, in California, conviction for assault with a deadly weapon or with force likely to produce great bodily injury carries a minimum sentence of one year and a maximum of ten years, yet rape under the same circumstances carries a minimum sentence of three years and a maximum of fifty years. Cal. Penal Code §245, 264 (West 1970).

In the face of the severe penalty structures, the conviction rate for forcible rape is lower than that for any other major crime listed in the F.B.I. Uniform Crime Reports. Of the F.B.I.'s four "violent crime" offenses, murder, forcible rape, robbery and aggravated assault, forcible rape has the highest rate of acquittal or dismissal. F.B.I.

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* I.e., in only three states is the maximum penalty for rape less than twenty years. Ill. (S.H.A. ch. 38 §11-1 [1972])(not less than 4 years); Missouri (V.A.M.S. §559.260)(not less than 2 years); New Hampshire (N.H.R. S.A. 632-A:2 [1975])(15 years). Several states provide a substantial minimum, e.g. Virginia (not less than 5 years) (Code of Va. §18.1-43); and Washington (not less than 5 years)(Wash. Stat. §9.79010).

Uniform Crime Reports 1973 (1974) table 18, at 116. See also People v. Rincon-Pineda, supra, 123 Cal. Rptr. at 129-30.*

Jury rejection of the death penalty for rape is an inescapable fact. As Petitioner's brief points out, only a handful of persons in the United States are under sentence of death for the crime of rape.

Both legal and social science commentators suggest there is a direct link between the harsh penalties which theoretically can be imposed for rape and the dearth of convictions.**

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*Kalven and Zeisel's study of criminal juries found that the juries convicted defendants of rape in just three of a series of forty-two cases studied, while the judge who presided over the same cases would have convicted in twenty-two. H. Kalven & H. Zeisel, The American Jury 252-54 (1966).

**Social science research supports the view that in general the severity of consequences associated with available decision alternatives may be a potent factor in jury decisions. Vidmar, "Effects of Decision Alternatives on the Verdicts and Social

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A recent empirical study which utilized scaling techniques to measure the intensity dimension of popular attitudes toward various crimes found that "rape without serious harm to the victim, manslaughter, and forcible rape were all rated as roughly equivalent" and tentatively concluded that punishments for rape are not in line with public perceptions of its seriousness. Hamilton & Rotkin, "Interpreting the

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(footnote continued from preceding page) **Perceptions of Simulated Jurors", Journal of Personality and Social Psychology, Vol. 22, No. 2, 211 (1972); The American Jury, supra, at 306-308. Thus, one investigator found that when simulated jurors were required to choose between finding a defendant guilty of murder (which they were told would result in a 25 year to life sentence) or not guilty, over 50% voted to acquit. On the same facts, when told that conviction would mean a one to five year sentence, over 90% found the defendant guilty. Vidmar, supra, at 214-21.

Kalven and Zeisel concluded as a result of their study that even with modest sentences, "the jury at times finds the penalty so disproportionate to its view of the offense that it is moved to acquit the defendant rather than subject him to that penalty." The American Jury, supra, at 312.

Eighth Amendment: Perceived Seriousness of Crime and Severity of Punishment", in Bedeau & Pierce, Capital Punishment in the United States, 515, 519 (1976).

Not only do juries in rape cases initially sympathize with the defendant, MacDonald, Psychiatry and the Criminal 235 (1969), but in the cases reported by Kalven and Zeisel in their exhaustive empirical study of criminal juries, juries went so far in their efforts to acquit the defendant as to create an extra-legal defense, the defense of "contributory behavior" on the part of the complainant, and to acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt. The American Jury, supra, at 254. This documentation of biased jury attitudes in rape cases suggests that juries are even more likely to acquit where extreme penalties for rape also exist.

Judicial analysis of negative jury reaction to severe sentences has focused upon mandatory death penalty statutes. In McGautha v. California, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers", id. at 198, and the fact that "jurors on occasion took the law into their own hands in (murder) cases which were 'wilful, deliberate and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate

for the death penalty. In such cases they simply refused to convict of the capital offense", id.at 199. In Woodson v. North Carolina, supra, 96 S.Ct. at 2984-85, the Court relied in part upon the history of unfavorable juror reaction to the harshness of mandatory death sentences in striking down the North Carolina mandatory death penalty statute. See also Mackey, "The Inutility of Mandatory Capital Punishment: An Historical Note", 54 B.U.L. Rev. 32 (1974). However, even under a non-mandatory statute such as Georgia's, if jurors perceive the crime as less grave than the written law does, they may choose to convict the defendant of a lesser included offense or acquit him entirely rather than find him guilty of a crime punishable by death.*

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*Although the Georgia statutes do not require the Court to inform the jury at the first, guilt-determination stage of the trial, that death is a possible penalty, Ga. Code Ann. §§ 26-3102, 27-2503(b), the extensive voir dire concerning capital punishment scruples which occurs in a death case will virtually always apprise the jurors of that fact. See Coker v. State, 234 Ga. 555, 216 S.E. 2d 782, 792-93 (1975). Moreover, even when the jury is told that the penalty is not their concern
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Moreover, the District Attorney's essentially unfettered discretion as to "whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the trial," would also tend to

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*"the threatened penalty may come to dominate the deliberation, because the jury guesses at the magnitude of the legal penalty, or because it has special reasons to know what the penalty actually is." The American Jury, supra, at 307.

Although the jury itself determines at the second, penalty phase whether to impose the death penalty, the Georgia statute does not require that it be told of its discretion during the first phase. Thus, a juror who believes the death penalty too severe, and fears its application by the court, may vote against finding guilt. Further, research indicates that even where the jury sets the penalty, the likelihood of jury nullification in a case where the penalty is perceived as excessive remains. The American Jury, supra, 311, n. 8.

Note, "Rape and Rape Laws: Sexism in Society and Law," 61 Calif. L. Rev. 919 (1973); Note, "The Rape Corroboration Requirement: Repeal Not Reform," 81 Yale L.J. 1365 (1972).

As expressed by one commentator:

> Societal ambivalence toward rape and its victims is expressed in the high maximum penalty for rape accompanied by a panoply of special instructions and evidentiary rules which decrease the possibility that there will be convictions and that the penalty will ever be imposed.

Babcock, Freedman, Norton and Ross, Sex Discrimination and the Law: Causes and Remedies (1975) at 868. The serious impact which special rules for rape have upon conviction rates is evidenced by New York's experience under a strict corroboration statute: in 1969, for example, there were 1085 arrests for rape in New York City and a mere 18 convictions. N.Y. Times, May 14, 1972, IV, p. 5:5.

Georgia's law reflects this distrust of the woman victim and the concomitant desire to provide the accused male with special protections not available to defendants charged with other crimes.*

*It has been observed that the special

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Ga. Code Ann. 26-2001 (1972); Teague v. State, 208 Ga. 459, 67 S.E. 2d 467 (1951).

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*evidentiary rules governing rape stem not only from distrust of women but also from the severe penalties to which the convicted rapist is subject:

> When the stakes are excessively high, the system becomes distorted in its protection of the accused, and concomitantly harsh in its efforts to be certain that the victim is telling the truth.

Babcock et al., Sex Discrimination, supra, at 868.

This effect was explicitly recognized by the American Bar Association in 1938 when it passed a resolution supporting mental examinations for a prosecuting witness in a rape case in virtually all circumstances. The report stated:

> The penalties for sex-crimes are very severe -- justly so, in most cases. But the very severity of the penalty calls for special procedural precautions to protect an innocent accused from condemnation by unreliable testimony.

Quoted in Commentary to Model Penal Code § 207 (1962) Part II-A, n. 6.

reduce the frequency of prosecutions and convictions for rape in a jurisdiction which has a death penalty statute. Note, "Prosecutorial Discretion", 21 De Paul L. Rev., 485, 486 (1972). See also Alschuler, "The Prosecutor's Role in Plea Bargaining", 36 U. Chi. L.R. 50, 55 (1966). This effect is apparently not confined to the United States. One report concluded that an effect of Norway's high minimum penalties for sex offenses was that the prosecutor "sometimes waived the prosecution in cases which perhaps ought to have been brought before the court, feeling that the punishment which the court would be bound to inflict would be too severe." Andenaes, Norwegian Legislation and Practice Concerning Sexual Offenses, in SEXUAL OFFENSES, Report of the Cambridge Dept. of Crim. Sci. 466 (Radzinowicz ed. 1957).

Finally, analysts have noted that the special evidentiary rules applied in rape cases, which stem at least in part from the heavy penalties associated with a rape conviction, both increase the likelihood of acquittal and deter the victim from prosecuting. See pp. 19-22 supra.*

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* For those concerned about protecting the victims of rape, there is one further argument against the death penalty: where rape as well as

In sum, because the death penalty for rape does not accord with "contemporary standards regarding the infliction of punishment", Woodson v. North Carolina, supra, 95 S. Ct. at 2983, as measured especially by jury determinations, it does not pass muster under the Eighth Amendment. In addition, genuine concern for victims of rape leads to the conclusion that severe statutory penalties, epitomized by the death penalty, are unacceptable since they do not serve the goal of convicting and subjecting to criminal sanctions those who are in fact guilty of rape.

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* murder is made a capital crime, "the criminal has every reason to kill his victim, since in this way he removes at a stroke the best possible witness against him without appreciably increasing the severity of his punishment if he is caught." Bedeau, The Death Penalty in America 273 (1967).

CONCLUSION

For the reasons stated above, Petitioner's death sentence for rape is unconstitutional and the decision of the court below should be reversed.

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